No. 89-98-CFX
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Title: Harold Davis, et ux., Petitioners
v.
United States

Docketed:
July 19, 1989

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Lee,Rex E.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jul 19 1989	G	Petition for writ of certiorari filed.
3	Aug 17 1989		Order extending time to file response to petition until September 20, 1989.
4	Sep 19 1989		Order further extending time to file response to petition until October 13, 1989.
5	Oct 13 1989		Brief of respondent United States filed.
6	Oct 18 1989		DISTRIBUTED. November 3, 1989
7	Nov 6 1989		Petition GRANTED.
			**********
8	Dec 4 1989		Record filed.
		*	Certified copy of original record received.
9	Dec 8 1989		Record filed.
		*	Certified copy of C. A. Proceedings received.
11	Dec 19 1989		Order extending time to file brief of petitioner on the merits until December 28, 1989.
12	Dec 28 1989		Joint appendix filed.
13	Dec 28 1989		Brief of petitioners Harold Davis, et ux. filed.
14	Dec 28 1989		Brief amicus curiae of Church of Jesus Christ of Latter-Day Saints filed.
15	Dec 28 1989		Lodging received. (3 copies).
16	Jan 26 1990		SET FOR ARGUMENT MONDAY, MARCH 26, 1990. (1ST CASE)
18	Jan 29 1990		Order extending time to file brief of respondent on the merits until February 9, 1990.
19	Feb 9 1990		Brief of respondent United States filed.
20	Feb 15 1990		CIRCULATED.
21	Mar 12 1990	X	Reply brief of petitioners Harold Davis, et ux. filed.
22	Mar 26 1990		ARGUED.

89-98

No. ———

Supreme Court, U.S.
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JUL 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HAROLD DAVIS AND ENID DAVIS,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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July 19, 1989

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QUESTION PRESENTED

Whether taxpayers' donations sent directly to an ordained missionary are deductible as charitable contributions under 26 U.S.C. § 170, where such donations are made at the request and under the direction of the missionary's church, in amounts specified by the church, and with the primary purpose of benefitting the church's missionary effort.

LIST OF PARTIES

The caption of the case contains the names of all parties.

In addition to the parties, The Church of Jesus Christ of Latter-day Saints, which operates a world-wide missionary program supported by voluntary contributions from its members, has an interest in the outcome of this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ——

HAROLD DAVIS AND ENID DAVIS,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Harold Davis and Enid Davis hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) as amended is reported at 861 F.2d 558 (9th Cir. 1988). The opinion of the district court (App., *infra*, 16a-25a) is reported at 664 F. Supp. 468 (D. Id. 1987).

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1988. Rehearing was denied on April 20, 1989. App., *infra*, 27a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

26 U.S.C. § 170 states in relevant part:

> (a) ALLOWANCE OF DEDUCTIONS.
>
> (1) General Rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year . . . .
>
> (c) CHARITABLE CONTRIBUTION DEFINED.
>
> For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—
>
> (2) A corporation, trust or community chest, fund, or foundation—
>
> * * * *
>
> (B) [O]rganized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, ...

STATEMENT

1. Petitioners Harold and Enid Davis, who reside in Idaho, are and were at all times relevant to this case members of The Church of Jesus Christ of Latter-day Saints (the "Church"), also known as the Mormon Church. The Church is a recognized tax-exempt organization with more than four million members in the United States. App., *infra*, 39a. As one of its primary functions, the Church operates a world-wide missionary program with unpaid, full-time volunteers serving as missionaries. These missionaries are selected according to strict standards of moral worthiness, faith, commitment, obedience, and physical and emotional fitness. App., *infra*, 29a, 39a. The Church currently has approximately 36,000 missionaries serving worldwide, of whom more than 25,000 are from the United States. Watson, *Statistical Report 1988*, The Ensign, May 1, 1989, at 19 (official church publication).

During the period relevant to this litigation, two of petitioners' sons—Benjamin and Cecil—served as Church missionaries. In 1979, Benjamin Davis was interviewed by his Bishop (a leader of a local congregation) and by his Stake President (a leader of several local congregations) who determined that Benjamin was worthy and suitable to serve as a missionary for the Church. These Church officers then submitted written recommendations to Church headquarters that Benjamin be "called" or appointed as a full-time missionary. Thereafter, the President of the Church sent a letter to Benjamin calling him to serve for two years as a missionary in the New York Mission. He was ordained an Elder, missionary and minister of the Church and sent to the Church's Missionary Training Center in Provo, Utah for two weeks of instruction and training. He then travelled to New York where he labored as a missionary until December 1981, serving and living in various areas selected by his Mission President (a leader responsible for full-time missionary operations in a particular region). App., *infra*, 17a, 40a-41a.

In a similar manner, Cecil Davis was called by the Church to serve as a missionary in the New Zealand/Cook Islands Mission. He was also ordained an Elder, minister and missionary of the Church. After attending the Missionary Training Center, Cecil was sent to the Cook Islands in 1981, where he served for eighteen months. App., *infra*, 18a, 42a.

While serving as missionaries, Benjamin and Cecil were not allowed to take vacations or to travel for personal purposes, and neither did so. Instead, they were expected to, and did, conform to a daily schedule which called for at least 10 hours per day of missionary work in addition to study time, meal time and planning time. App., *infra*, 30a. Benjamin averaged over 70 hours per week of missionary work plus 10 hours per week of study and preparation. Cecil averaged 60 hours per week of

missionary work plus 10 to 25 hours per week of study, including language study. App., *infra*, 43a-44a. Throughout their missions they were subject to the direct supervision and control of their mission presidents and other Church leaders who set rules governing their proselyting schedules, dress and grooming habits, theological and language training and other activities. Mission rules prohibited, among other things, dating, watching movies and plays and participating in certain sports. App., *infra*, 3a, 30a.

2. Neither Benjamin nor Cecil had saved sufficient money to pay all the costs of his mission. In such cases, it is and has long been the practice of the Church first to ask a missionary's family to contribute the necessary financing. App., *infra*, 2a, 31a. If a missionary's family is unwilling or unable to contribute the necessary funds, the Church seeks donations from other Church members living in the same community as the missionary, or supplies funds from other Church sources, so that all prospective missionaries who are willing and eligible are able to serve. App., *infra*, 31a.

When a parent or any other member of the Church donates money to defray a missionary's expenses, the Church strongly prefers that the donor send the funds directly to the missionary. App., *infra*, 31a-32a. Through a century and a half of experience with its missionary program, the Church has determined that this direct transmittal of contributions produces several specific and important benefits to the Church and its members. First, direct transmittal fosters commitment and frugality among the Church's missionaries by making them more aware of the personal sacrifices being made by the donors. Knowing that his or her family bears the financial burden of a missionary's service helps remind the missionary that the mission is a period of dedication, service and sacrifice. Second, direct transmittal makes the donor feel more a part of the missionary's efforts, thereby fostering and

reinforcing the spirit of mutual sacrifice that is central to Church doctrine. This sharing in the missionary effort is particularly valuable when the missionary is a member of the donor's family. Third, direct transmittal reduces the substantial administrative and bookkeeping requirements that would otherwise be imposed on the Church, thereby preserving the Church's resources for additional charitable and religious work. App., *infra*, 3[illegible] 32a.

The Church exercises substantial control over such direct donations at two levels. First, the Church specifies the amount each missionary will need and, accordingly, the amount that donors will be requested to contribute. App., *infra*, 2a, 29a, 33a. The amounts requested depend upon living costs in each mission area and are set at a level that requires each missionary to be frugal. App., *infra*, 32a-33a. Indeed, the Church has a strong incentive to set the requested missionary contributions at low levels, and has consistently done so over the years. The reason is that a low spending limit not only lessens the financial burden on Church members, but also, in the Church's experience, increases the dedication and effectiveness of its missionaries. See App., *infra*, 30a-31a. In short, the Church has found that its missionaries are most effective in their service when their expenditures are kept within the limits specified by the Church.

Second, the Church exercises substantial control over expenditures made by individual missionaries. Missionaries are given specific instructions with respect to the expenditures of donated funds and are required to keep financial records of all expenditures. These financial instructions are given to each missionary on numerous occasions and are printed in a handbook that each missionary carries at all times. App., *infra*, 32a-33a. Moreover, to ensure that these instructions are followed, each missionary is required to submit a weekly report to his or her Mission President listing, among other things, his or her expenditures. App., *infra*, 3a, 38a.

The control exercised by the Church over missionary donations is well illustrated in the present case. Shortly after each of the petitioners' sons was called as a missionary, the Church sent a letter specifying the expected level of expenses for each mission. Based on Church custom and practice, the petitioners understood that these letters were intended by the Church to establish the amounts which the Church desired each missionary to receive. App., *infra*, 36a. In each case, the Church adjusted the specified amount as circumstances changed. The amount specified for Benjamin's mission to New York averaged $290 per month in 1980 and $350 per month in 1981 (see App., *infra*, 41a), and the amount specified for Cecil's mission to the Cook Islands averaged $225 in 1981 (see App., *infra*, 42a). The charitable contribution deductions at issue in this case did not exceed the amounts set by the Church. App., *infra*, 4a, 36a. Both missionaries in this case, moreover, made a commitment to petitioners to use the missionary funds only in accordance with the Church's instructions. App., *infra*, 36a. Finally, both missionaries completed weekly reports detailing their expenditures. App., *infra*, 44a. In sum, the amounts donated, the method of payment and the expenditure of donated funds were all in accordance with the requests and instructions of the Church.

The petitioners' intent in making these contributions was to benefit the religious and charitable work of the Church. Petitioners expressly declared, without contradiction, that their primary motive was "a sincere religious desire to . . . support the Church's missionary program." App., *infra*, 36a.

3. Petitioners initially filed their income tax returns for taxable years 1980 and 1981 without claiming as charitable contribution deductions the amounts paid to finance the missionary services of their sons. In 1984, the Tenth Circuit held in *White* v. *United States*, 725 F.2d 1269 (10th Cir. 1984), that identical contributions

were deductible as charitable contributions under 26 U.S.C. § 170, as long as the "primary purpose" of those contributions was to benefit the charitable organization. 725 F.2d at 1272. Section 170 provides a deduction for contributions made "to *or for the use of*" a qualified charitable organization.

In light of the *White* decision, petitioners amended their returns and filed a claim for refund with the Internal Revenue Service. When their claim was denied, the taxpayers filed a refund action in the United States District Court for the District of Idaho.

While the case was pending before the district court, the Fifth Circuit ruled in *Brinley* v. *Commissioner*, 782 F.2d 1326 (5th Cir. 1986), that contributions transmitted directly to the Church's missionaries are "for the use of" the Church within the meaning of Section 170 and are therefore fully deductible provided that the Church exercises some control over the contributions. *Id.* at 1334. The Fifth Circuit held that such control would be established if the taxpayer could show that the Church requested specific payments to a missionary, that the taxpayer responded to that request and that the amounts claimed as a deduction did not exceed the amount specified by the Church. *Id.* at 1335-36. According to that court, "full control in the form of actual or physical possession" is not required. *Id.* at 1335.

The district court expressly declined to follow either the Fifth or the Tenth Circuit's interpretation of Section 170, and entered summary judgment in favor of the United States. The court concluded that a contribution by a third party to defray the costs incurred by a missionary of the Church is not "for the use of" the Church within the meaning of Section 170—and is therefore not deductible as a charitable contribution—unless the Church exercises control amounting to "possession of the contribution." App., *infra*, 24a. Recognizing that its decision was in conflict with *Brinley* and *White*, the district court

stated that it was "not bound by the rulings of the Tenth and Fifth Circuits." App., *infra*, 21a.

The Ninth Circuit affirmed the grant of summary judgment, essentially adopting the reasoning of the district court. The court of appeals explicitly rejected the Tenth Circuit's decision in *White* and the Fifth Circuit's decision in *Brinley*. App., *infra*, 9a. Instead, the Ninth Circuit held that a contribution made for the purpose of paying the costs of missionary service by another is "for the use of" the Church only if the Church has "actual control over [*i.e.*, possession of] the funds." App., *infra*, 9a. Summarizing its decision, the court concluded that "[t]he statutory system . . . does not provide for a deduction by a taxpayer who does not actually render service to the charity or made a contribution directly to the charity." App., *infra*, 15a.[1]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has decided an important and recurring issue of tax law in a way that directly conflicts with decisions of other courts of appeals. The court's interpretation of Section 170 also ignores the plain language of the statute, the reasoning of prior decisions by this Court and sound principles of statutory construction.

---

[1] Like the district court, the Ninth Circuit also rejected the taxpayers' alternative argument that their contributions are deductible under Section 170 because they fall within Treasury Regulation 1.170A-1(g). That regulation permits a taxpayer to deduct as a charitable contribution "unreimbursed expenditures made incident to the rendition of services" to a qualified charitable organization. 26 C.F.R. § 1.170A-1(g) (1988). The courts below held that the regulation applies only to unreimbursed expenses incurred in connection with the taxpayer's own service to a charitable organization, and therefore does not apply to the missionary contributions at issue here. App., *infra*, 14a, 22a. In contrast, both *White* and *Brinley* had held that at least some portion of missionary contributions falls within Regulation 1.170A-1(g), even when the missionary services are rendered by someone other than the taxpayer. See *White*, *supra*, 725 F.2d at 1271; *Brinley*, *supra*, 782 F.2d at 1332.

The court's decision, moreover, creates a substantial impediment to the efficient and effective operation of the Church's missionary activities and imposes a serious burden upon millions of its American members, the vast majority of whom live in the Ninth and Tenth Circuits.

1. The decision of the Ninth Circuit is in direct and irreconcilable conflict with the holdings of the Tenth Circuit in *White* and the Fifth Circuit in *Brinley*. The Ninth Circuit has squarely held that contributions made for the purpose of paying the expenses of missionary service by another are deductible *only* if those contributions are made directly to the Church. See App., *infra*, 9a (requiring "actual control"), 15a (contribution must be "directly to the charity"). By contrast, the Tenth Circuit's decision in *White* and the Fifth Circuit's decision in *Brinley* permit missionary contributions to be deducted even when transmitted directly to the missionary rather than to the Church. The specific legal principle adopted by the Ninth Circuit's decision is therefore irreconcilable with that followed in *White* and *Brinley*, both of which involved facts virtually identical to those in this case. Indeed, the Ninth Circuit expressly acknowledged this conflict:

> The Tenth Circuit addressed this issue in *White v. United States*, 725 F.2d 1269 (10th Cir. 1984), in a factual setting indistinguishable from the one at bar . . . . Applying th[e] "primary purpose" test, the court determined that payment for the support of a full-time missionary who was away from home primarily served the goals of the Church rather than the missionary and was therefore deductible. *Id.* *See also Brinley v. Commissioner*, 782 F.2d 1326, 1330-32 (5th Cir. 1986) . . . . We decline to apply the primary purpose test here.

App., *infra*, 8a.

This conflict—particularly the one between the Ninth and Tenth Circuits—has unusually severe practical and

symbolic consequences. Approximately 40 percent (1.65 million) of the Church's 4 million American members live within the Ninth Circuit, while an approximately equal number (1.5 million) live within the Tenth Circuit.[2] Similar percentages of the Church's 25,000 American-born missionaries come from those two Circuits.[3] In practical terms, the Ninth Circuit's decision means that Church members living to the east of the border between the Ninth and Tenth Circuits (which runs from Montana to Mexico) can deduct contributions transmitted directly to the Church's missionaries, while those living to the west of that border cannot. Thus, a different rule applies to Church members in Denver, Salt Lake City and Albuquerque than applies to those in Boise, San Francisco and Phoenix. The existence of two contradictory tax rules that depend for their application solely upon geography not only creates administrative difficulties for the Church (and no doubt for the IRS), but also undermines public confidence in the tax laws.

The impact of this conflict in the interpretation of Section 170, moreover, is by no means limited to the Church and its members. Under the decision below, the phrase "for the use of" in Section 170 applies only to contributions placed in the actual possession of a charitable organization. Under the decisions of the Fifth and Tenth Circuits, by contrast, this statutory language also applies to contributions transmitted directly to third parties—provided those contributions satisfy a "primary purpose" or "primary benefit" test. The resulting doctrinal confusion affects a wide range of charitable contributions

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[2] Deseret News, *1989-90 Church Almanac*, 121 (1988). Approximately 173,000 (4.4 percent) of the Church's United States members live within the Fifth Circuit. *Id.*

[3] As of December 31, 1988, the Church had 25,465 missionaries from the United States, of whom 9,906 were from states within the Ninth Circuit, and 12,090 were from states within the Tenth Circuit. Missionary Department of the Church of Jesus Christ of Latter-day Saints, unpublished data (December 31, 1988).

beyond the Church's own missionary program. See, *e.g.*, *Lesslie* v. *Commissioner*, 36 T.C.M. 495 (1977) (contribution sent directly to Presbyterian missionary held deductible); *Winn* v. *Commissioner*, 595 F.2d 1060 (5th Cir. 1979) (contribution payable to Presbyterian missionary, delivered to missionary's father and deposited directly in missionary's account held deductible; *Rockefeller* v. *Commissioner*, 676 F.2d 35 (2d Cir. 1982) (payments directly to third parties to reimburse them for expenses incurred while rendering services to various charities held deductible); *Archbold* v. *United States*, 444 F.2d 1120 (Ct. Cls. 1971) (legal fees paid by donor to prevent charity from misusing donated property held deductible).

2. The Ninth Circuit not only decided the question presented in a manner fundamentally at odds with decisions in other circuits; it also decided that question incorrectly. The decision is incorrect for at least two reasons:

First, the Ninth Circuit's adoption of an "actual control" or possession test for deductibility contravenes the plain language of Section 170. As previously noted, the precise question of statutory interpretation in this litigation is whether the sum of payments made by the petitioners, at the request of and in full compliance with the program of the Church, constitutes a "gift or contribution to *or for the use of*" the Church within the meaning of Section 170. A plain reading of that language indicates that the class of deductible contributions is broader than the class of contributions that can be characterized as being made "to" the charitable organization.

Indeed, the legislative history of Section 170 reveals that this was precisely what Congress intended. The original wording of the contribution deduction statute provided a deduction only for contributions made "to" a qualified charitable organization. Relying upon that statutory language, an early Internal Revenue Service decision held that payments to a Community Chest were not

deductible because the contribution had not been paid directly "to" the qualifying charity. O.D. 699, 3 C.B. 187 (1920). In the wake of that decision, Congress modified the language of the statute by providing that gifts or contributions would be deductible if they were "to *or for the use of*" a charity. Revenue Act of 1921, Ch. 136, § 214(a)(11), 42 Stat. 227 (1921). Thus, the legislative history of Section 170 confirms what is clear from the provision's language: that the phrase "or for the use of" means something; that is, it describes a class of contributions separate and distinct from contributions made directly "to" a charitable organization.

The Ninth Circuit's decision, however, eviscerates the statutory language. The Ninth Circuit's requirement that the Church have possession or "actual control" of the contribution represents, in reality, a requirement that the contribution be made "to" the Church itself. Obviously, the Church obtains possession of a contribution only if the donor makes the contribution directly "to" the Church rather than to someone else. The Ninth Circuit's decision, therefore, effectively and improperly eliminates "or for the use of" from the statute. Cf. 2A *Sutherland Statutory Construction* § 46.06 (1984); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955). The decisions in *White* and *Brinley*, by contrast, are consistent with the plain language of Section 170 because they give congressionally intended independent effect to the "or for the use of" clause.

Second, the decision below conflicts with the controlling reasoning of a prior decision of this Court. In *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960), this Court held that for purposes of determining whether a transfer was a "gift" within the meaning of Section 102 (exclusion of gifts from income), Congress adopted a nontechnical standard based upon the donor's intent:

> [T]he proper criterion established by decision here, is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer. Further than that we do not think it profitable to go.

363 U.S. at 286. It has long been settled that the term, "contribution" in Section 170 has the same meaning as the term "gift" in Section 102. See *DeJong* v. *Commissioner*, 309 F.2d 373, 376 (9th Cir. 1962).

Accordingly, since *Duberstein*, the federal appellate courts have acknowledged that the considerations articulated in that decision also apply in interpreting the phrase "gift or contribution" in Section 170. In *White* v. *United States*, for example, the Tenth Circuit reasoned:

> [T]he Courts have focused on whether the donor's intent was charitable, *see Dowell v. United States*, 553 F.2d 1233, 1238 (10th Cir. 1977), and whether the primary purpose of the expenditure was to further the aims of the charitable organization or to benefit the spender.
>
> * * * *
>
> [T]he proper test, we hold, is . . . whether the primary purpose is to further the aims of the charitable organization or to benefit the person whose expenses are being paid. When the payment is for part of the costs of necessary travel and for all of the living expenses of a dependent member of taxpayer's household serving as a full-time Church missionary away from home we have no difficulty concluding that the expenditure is deductible because the expenditure primarily serves the Church.

725 F.2d at 1272. In adopting a technical "physical control" test without regard to petitioners' unquestioned purpose in making the contributions, the Ninth Circuit ignored the clear teaching of *Duberstein*.

The Ninth Circuit's misguided interpretation of Section 170 is an additional reason supporting a grant of certiorari in this case. This Court should reverse the Ninth Circuit's decision and adopt the tax rule articu-

lated by the Fifth and Tenth Circuits in *Brinley* and *White*.

3. Finally, the decision below affects a large number of taxpayers living within the Ninth Circuit and imposes a heavy burden on the Church's ability effectively to pursue its missionary goals. Obviously, the most immediate impact of the decision below falls upon the thousands of Church members within the Ninth Circuit who, at the request of the Church, have sent, or will send, contributions directly to the Church's missionaries. Those members will not be able to claim (or retain) deductions for such contributions.

But the Ninth Circuit's decision, if allowed to stand, will have more serious long-term consequences for the Church and its members. As a result of that decision, none of the more than 1.6 million Church members living within the Ninth Circuit will be able to claim any deductions for missionary contributions in the future unless the Church maintains a system for collecting and then redistributing missionary donations. This not only creates heavy administrative burdens for a Church that relies almost entirely upon its laity to administer the affairs of its local congregations; it also impedes the Church's efforts, through its missionary program, to teach its members and missionaries the principle of sacrifice. By requiring the Church to maintain such a system in order for the benefactors of its missionary program to qualify for tax deductions, the decision below forces the Church and its members to choose between those deductions and the religious benefits arising from direct transmittal of missionary contributions—benefits which rest on a historical tradition reaching back to the beginnings of the Church itself.

* * *

In sum, the decision of the Ninth Circuit creates a square and acknowledged conflict in the circuits and departs from both the plain language of the statute and prior decisions of this Court. The decision thereby creates inconsistency and uncertainty in the application of federal tax law in an area of national importance. It also imposes significant burdens upon the Church and millions of its members living within the Ninth Circuit. Accordingly, this case presents a substantial question of federal law that merits the Court's attention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 19, 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 87-4170

HAROLD DAVIS AND ENID DAVIS,
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Argued and Submitted Oct. 4, 1988
Decided Nov. 14, 1988
As Amended Feb. 21, 1989

Wilford W. Kirton, Jr., Kirton, McConkie & Bushnell, Salt Lake City, Utah, for plaintiffs-appellants.

Francis M. Allegra, Dept. of Justice, Washington, D.C., for defendant-appellee.

Appeal from the United States District Court for the District of Idaho.

Before BROWNING, BRUNETTI and TROTT, Circuit Judges.

BRUNETTI, Circuit Judge:

INTRODUCTION

This matter is before the court following the district court's granting of summary judgment in favor of the United States, *Davis v. United States*, 664 F.Supp. 468 (D. Idaho 1987). Plaintiff-appellants Harold and Enid

Davis claimed charitable deductions under Internal Revenue Code Section 170 for funds they sent to their two sons for their support while they served as fulltime unpaid missionaries for the Church of Jesus Christ of Latter-Day-Saints ("Church"), Benjamin Davis at the New York City Mission and Cecil Davis at the New Zealand/Cook Islands Mission. These deductions were disallowed by the Internal Revenue Service and the appellants initiated the present refund suit. The district court determined that (1) these funds were not deductible as "unreimbursed expenses" because such expenses may be deducted only by the individual performing services while "away from home," and only if the primary motive in performing the services was to benefit the charity, and (2) that they were not deductible as charitable contributions because the Church did not exercise sufficient control over the disposition of the funds.

We have jurisdiction pursuant to 28 U.S.C. Sec. 1291 and affirm.

BACKGROUND

A primary activity of the Church is its worldwide missionary program. Over 25,000 individuals have participated annually since 1977. Missionaries typically serve the Church for two years at a location assigned by the Church. Missionary work is uncompensated, but the Church will pay mission-related expenses if the missionary is unable to support himself or obtain the necessary funds from his family. Most missionaries are between the ages of nineteen and twenty-two; many receive payments from their parents to defray their living expenses. After an individual is "called" by the Church to serve as a missionary the Church advises parents of the amount for the missionary's support and requests their assistance.

The life of a missionary is closely supervised by the Church. Benjamin and Cecil were expected to conform to a schedule that regulated most of their waking hours. Both missionaries claim to have devoted over seventy-five hours per week to missionary work and religious study. Mission rules prohibit missionaries from dating, attending movies or plays, or engaging in various sports or other activities. Missionaries are required to submit weekly reports to their Mission President detailing the amount of time spent in Church service and explaining their expenses for the week. The Missionary Handbook contains the following admonition to missionaries: "The money received for your support is sacred and should be spent wisely and only for necessary work. Keep expenses at a minimum. . . . Keep financial records of all expenditures."

The Church gives several reasons for its preference not to collect and distribute contributions for the support of its missionaries. First, the Church feels that direct contributions to missionaries foster the Church doctrine of sacrifice and consecration. Second, the Church believes that direct transmittal promotes frugality by missionaries because of their awareness of the personal sacrifices that are being made on their behalf. Third, direct transmittal of contributions reduces the administrative and bookkeeping expenses that would otherwise be imposed on the Church.

The appellants' sons, Benjamin and Cecil, both volunteered for, and were "called" by the Church to serve as missionaries when they became nineteen years old. During 1980 and 1981 the appellants transferred $3480.89 and $4135.00 to Benjamin's checking account. Except for approximately $20 per month, which was used to purchase religious materials, Benjamin used this money primarily for living expenses. During 1981 appellants transferred $1518.00 to Cecil's checking account. Cecil also used this money primarily to pay his living expenses.

At the end of his missionary service, Cecil had no unexpended funds. Benjamin had unexpended funds with which he purchased a camera. The appellants filed two amended tax returns for 1980 and 1981; the first claiming as charitable contributions the full amounts they sent to their sons, and the second reducing this amount to what has been requested by the Church and disclaiming their sons as dependents.

The appellants attempted to characterize their deductions as unreimbursed expenses incurred in charitable service or, in the alternative, as charitable contributions. The district court refused to consider the claimed deductions as unreimbursed expenses because they were incurred by a person other than the taxpayer, *Davis*, 664 F. Supp. at 471-72. In determining whether the deductions could be characterized as charitable contributions the district court applied a "control" test, which considers whether the charitable organization exercises control over the use of the funds. Concluding that the missionaries, rather than the Church, controlled the disposition of the funds, the district court held that the deductions were properly disallowed by the Internal Revenue Service. *Id.* at 472. Thus, the Government's motion for summary judgment was granted.

STANDARD OF REVIEW

We review a grant of summary judgment *de novo*. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986) (citing *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983)); *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). The appellate court's review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). *Darring*, 783 F.2d at 876. The appellate court must determine, viewing the evidence in a light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.

Ashton, 780 F.2d at 818. *See also Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9th Cir. 1985). Because the material facts are not in dispute, our inquiry is limited to the district court's application of the substantive law.

DISCUSSION

A. *Applicable Law*

We take judicial notice of the fact that the Church is a qualified religious organization to which deductible contributions can be made. Internal Revenue Service Publication No. 78, *Cumulative List of Organizations* 216 (1984).

26 U.S.C. Sec. 170: Section 170 of the Internal Revenue Code, 26 U.S.C., provides in part:

> (a) *Allowance of deduction.*—
>
> (1) *General Rule.*—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowed as a deduction only if verified under regulations prescribed by the Secretary.
>
> . . . .
>
> (c) *Charitable contribution defined.*—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—
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> . . . .
>
> (2) A corporation, trust, or community chest, fund, or foundation—
>
> . . . .
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. . . .

Treas. Reg. 1.170A-1(g): Title 26 C.F.R. Section 1.170A-1(g) provides:

> *Contributions of services.* No deduction is allowable under Section 170 for a contribution of services. However, unreimbursed expenditures made incident to rendition of services to an organization contributions to which are deductible may constitute a deductible contribution. For example, the cost of a uniform without general utility which is required to be worn in performing donated services is deductible. Similarly, out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. Reasonable meals and lodging necessarily incurred while away from home in the course of performing donated services also are deductible.

From the foregoing statutes it is apparent that expenditures may be deductible under two approaches. First, under Section 170, deductions are allowed for charitable contributions made "to or for the use of" qualified organizations. The requisite elements are (1) that the transfer of property is made with no expectation of a quid pro quo, (2) that it is made to a qualified recipient, and (3) that it is made "to or for the use of" the qualified recipient. *See Smith v. Commissioner*, 800 F.2d 930, 934 (9th Cir.1986); *Allen v. United States*, 541 F.2d 786, 788 (9th Cir.1976). Second, under Treas.Reg. 1.170A-1(g), expenditures related to the contribution of services are deductible as "unreimbursed expenses made incident to the rendition of services" to a qualified organization. The appellants argue that the payments they made to their sons were "for the use of" the Church and therefore deductible as charitable contribution, or, in the alternative, that they are deductible as unreimbursed expenditures made in connection with the contribution of services to the Church. The government argues that the expenditures were not charitable contributions because they were never within the physical control of the Church, and that they were not unreimbursed expenses because the individual claiming the deduction did not perform the services.

B. *Charitable Contributions*

In situations where a taxpayer has claimed a charitable deduction for funds that have been earmarked for a specific individual, courts have considered whether the charity exercises control over the use of the funds. *See Winn v. Commissioner*, 595 F.2d 1060, 1065 (5th Cir. 1979) (church sponsored fund raiser to collect funds as part of its work, [church] officer took the funds donated and dealt with them as the church wished, and funds went to support the work the church intended, is sufficient to establish funds were donated "for the use" of the church); *Peace v. Commissioner*, 43 T.C. 1, 7-8 (1964) ("Contributions to mission earmarked for specific individuals deductible because the mission had exclusive control, under its own policy, over funds and taxpayer's designation of specific individuals only manifested a desire to have the donations credited to the support of those individuals."); *see also Tripp v. Commissioner*, 337 F.2d 432, 436 (7th Cir.1964) (payments earmarked for the educational expenses of a particular individual not deductible because they were not made "to a general scholarship fund to be used as the college saw fit").

The appellants assert that because their contributions conferred a benefit on the Church they should qualify as charitable contributions. They claim that actual control by the charity is a factor to be considered, but should not be required in all cases. Rather, the appellants urge, the test of deductibility should turn on whether the contributions stem from a charitable intent on the part of the donor. The government responds that the plain wording of Section 170 precludes this construction and that the deduction should be disallowed because the contributions were received directly by the missionaries from the taxpayer (parents) and were neither to nor for the use of the Church. The government also argues that a charitable intent can only exist where the contribution is based on a "detached and disinterested generosity," *see Com-*

missioner v. Duberstein, 363 U.S. 278, 285, 80 S.Ct. 1190, 1197, 4 L.Ed.2d 1218 (1960) (internal quotation omitted), that was absent in this case because the donors received a quid pro quo—the assurance that the family member who was serving as a missionary would be properly clothed, housed, and fed. *Cf. DeJong v. Commissioner*, 369 F.2d 373, 376 (9th Cir.1962) (money spent toward the education of a specific child is a family expense and therefore is not deductible as a charitable contribution to the school).

The Tenth Circuit addressed this issue in *White v. United States*, 725 F.2d 1269 (10th Cir.1984) in a factual setting indistinguishable from the one at bar. The government in *White* urged the court to adopt the control test that was first applied by the Tax Court in *Peace v. Commissioner*, 43 T.C. at 7-8. In *Peace*, the taxpayers sent checks to the Sudan Interior Mission, which were deposited by the Mission into a common pool from which all missionaries received their support. *Id.* at 7. The *Peace* court found it critical that donations were deposited in a common pool and disbursed only as the mission determined, despite specific directives by the donors. *Id.* at 8. *See also* Rev.Rul. 62-113, 1962-2 C.B. 10 ("The test in each case is whether the organization has full control of the donated funds as to their use, so as to insure that they will be used to carry out its functions and purposes."). The *White* court rejected the control test and held that the proper test of deductibility is "whether the primary purpose [of the contribution] is to further the aims of the charitable organization or to benefit the person whose expenses are being paid." *White*, 725 F.2d at 1271-72. Applying this "primary purpose" test, the court determined that payment for the support of a full-time missionary who was away from home primarily served the goals of the Church rather than the missionary and was therefore deductible. *Id. See also Brinley v. Commissioner*, 782 F.2d 1326, 1330-32 (5th Cir.1986) (Control is a "legitimate gauge" in determining deductibility, but the standard is whether the charitable work is the cause of the payment, and causation is established when the charity is the primary beneficiary of the gift.).

With the exceptions of the Tenth Circuit in *White* and the Fifth Circuit in *Brinley*, however, courts have employed the primary purpose test only in those instances in which the taxpayer has sought a charitable deduction for his own expenses. *See Brinley*, 782 F.2d at 1338 (Hill, J., dissenting). We decline to apply the primary purpose test here. The better reasoned approach, we feel, is to require that the recipient charity have control over the donated funds. The control gauge stems from the basic requirement that the beneficiary of a charitable contribution must be indefinite. *See Russell v. Allen*, 107 U.S. 163, 167, 2 S.Ct. 327, 330, 27 L.Ed. 397 (1883). When a taxpayer intends a contribution for a specific purpose, or even a specific individual, but the charity retains control over the funds, this requirement is satisfied. But when a taxpayer makes a contribution directly to the intended beneficiary so that the charity never possesses the funds, let alone controls their use, there can be no guarantee that the beneficiary will be indefinite. *See Barry's Estate v. Commissioner*, 311 F.2d 681 (9th Cir.1982) (property bequeathed to member of Jesuit Order, as opposed to Order itself, not deductible though legatee obligated by Canon law to transfer property acquired to the Order; court noted possibility that legatee could leave the Order). Here the charity lacked actual control over the funds. Contributions were deposited directly into the personal checking accounts of the taxpayers' sons. While the Church admonished the missionaries to spend their money wisely, the particular use to which the funds were put was solely within the control of the missionaries. Any surplus received by the missionaries was theirs to keep, and other than requiring the missionaries to submit weekly reports of their expenses, the Church had no discretion over the disposition of the funds.

C. *Unreimbursed Expenses*

Regarding deductions that are claimed for unreimbursed expenses, we apply a "primary benefit" test: the expenditure is deductible only if the charity, rather than the taxpayer, receives the primary benefit of the expenditure. *See Babilonia v. Commissioner*, 681 F.2d 678, 679 (9th Cir.1982). We have not previously considered the deductibility of expenses incurred by an individual other than the taxpayer. The appellants argue that the district court erred in concluding that Treas. Reg. 1.170A-1(g) was applicable only to the individual actually performing the services. Rather, the appellants urge the panel to construe the statutes liberally and follow the *White* court, which declared, "We see no rational basis for distinguishing the payment of the expenses of a dependent son from the payment of a taxpayer's own expenses to perform the same services." *White*, 725 F.2d at 1271.

The government responds that there is a legitimate basis for distinguishing between the individual who performs the services and the one who claims the deduction: while in theory there may be no difference between deducting amounts paid to a missionary for his Church-related expenses and paying the Church the same amount in the form of a deductible contribution, in practice a significant burden will be imposed on the Tax Service to prevent taxpayer abuses from this activity. Two specific types of abuses are feared by the government. First, parents in high tax brackets could contribute large amounts to their children, who they would be supporting anyway had they not undertaken a mission, and claim the amount was contributed to support charitable activity. The parents could then deduct an amount well in excess of what the charity would have paid the children for the same services. Moreover, deductions properly claimed by low tax bracket missionaries would shift to donees in higher tax brackets. These potential abuses would force

the IRS to investigate the reasonableness of all direct contributions to missionaries. On the other hand, the government argues, if the money were required to first go to a charity, the possibility that excessive contributions would benefit the missionary rather than the charity would be greatly reduced. *See Brinley v. Commissioner*, 782 F.2d 1326, 1338 (5th Cir.1986) (Hill, J., dissenting).

Second, the government points out, double deductions could occur for the same expenditure: one by the donor and another by the missionary. While this specific wrongdoing is not alleged in the present case, it is a legitimate concern. We note, and find it troubling, that the Davises filed an amended United States individual income tax return, Form 1040X, for the years 1980 and 1981 claiming personal exemptions for their sons as dependents while at the same time claiming a charitable deduction for all the funds they paid to their sons for their support while serving as missionaries. When the IRS disallowed the claims, the Davises filed a suit for refund. Thereafter, the Davises filed a second set of amended returns limiting the amount of their claimed charitable deductions to the amounts the church established as the range of expenses for each mission and did not list Benjamin and Cecil as dependents. The first amended return illustrates the potenial for double deductions that, while perhaps unintentional, nevertheless would deprive the government of revenue.

Other courts have concluded that in certain situations the taxpayer will be allowed a deduction for the unreimbursed expenses of a family member that are incurred in charitable work, and the Fifth Circuit has directly addressed the issue of unreimbursed expenses of Mormon missionaries. In *Brinley v. Commissioner*, 782 F.2d 1326 (5th Cir.1986), the court rejected the decisiveness of the *White* "primary purpose" test and applied a different test to allow a portion of the claimed deduction. The *Brinley* court chose to characterize the expenditures as unreim-

bursed expenses rather than charitable contributions, and applied a "causation" test, holding that "[t]he charitable work must be the cause of the payment in order for the payment to be deductible." *Id.* at 1331 (quoting *Orr v. United States*, 343 F.2d 553, 557 (5th Cir.1965)). *See also McCollum v. Commissioner*, 37 T.C.M. (C.C.H.) 1817, 1819-21 [available on WESTLAW, 1978 WL 3101] (1978) (taxpayer allowed a deduction for the expenses that he and his family members incurred in connection with their services to the National Ski Patrol, a qualified charitable organization).

Significantly narrowing the scope of the deduction that was allowed in *White*, the *Brinley* court further determined that the missionary's tax home was where he was serving the Church, thereby precluding deductions for food and lodging expenses by either the parents or the missionary himself. A deduction was allowed only for those expenditures that primarily benefited the charity, i.e., proselytizing and out-of-pocket transportation expenses incurred by the missionary in the performance of his work. *Id.* at 1332.[1]

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[1] The determination of whether a taxpayer is away from home for tax purposes "is essentially a question of fact." *Frank v. United States*, 577 F.2d 93, 97 (9th Cir. 1978) (citing *Curtis v. Commissioner*, 449 F.2d 225, 227 (5th Cir. 1971)). "Away from home," for the purposes of Section 170, is the same as under Section 162, which allows a deduction for all "ordinary and necessary expenses paid or incurred during the taxable year . . . while away from home in pursuit of a trade or business." In the context of business deductions, a taxpayer's home is his principal place of business. *Wills v. Commissioner*, 411 F.2d 537, 540 (9th Cir. 1969). A taxpayer will be deemed to be away from home if he is on an assignment that will terminate within a reasonably short period of time. *Harvey v. Commissioner*, 283 F.2d 491, 495 (9th Cir. 1960) ("[a]n employee might be said to change his tax home if there is a reasonable probability . . . that he may be employed for a long period of time at his new station. . . . On the other hand, if it is very likely that taxpayer's stay away from home will be short; then it seems quite unreasonable to expect him to move his domicile. . . ."). *See also*

We do not read Treas.Reg. 1.170A-1(g) as permitting a deduction for unreimbursed expenses by anyone other than the taxpayer that actually performs the charitable service. Congressional interpretations of this section of this regulation supports our conclusion. As part of the Tax Reform Act of 1986, the House Ways and Means Committee made the following observation regarding Treas.Reg. 1.170A-1(g): "A taxpayer may deduct, as charitable deductions, unreimbursed out-of-pocket expenses incurred incident to the rendition of services *provided by the taxpayer* to a charitable organization." H.R.Rep. No. 99-426, 99th Cong., 1st Sess. 119 (1985) (emphasis added). Similarly, the Joint Committee on Taxation's *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, 98th Cong., 2d Sess. at 1133 (1984) (emphasis added) provides: "Unreimbursed out-of-pocket expenses *incurred by the taxpayer* in rendering services to an organization . . . are eligible for deduction as charitable contributions . . . ." It is a fundamental principle of tax law that assignments of deductions are prohibited. *See New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440-41, 54 S.Ct.

Peurifoy v. Commissioner, 358 U.S. 59, 60, 79 S.Ct. 104, 105, 3 L.Ed.2d 30 (1958) (deduction allowed if employment is "temporary" as contrasted with "indefinite" or "indeterminate").

Thus, a temporary assignment of "short" duration will not require the taxpayer to relocate his tax home. Missionaries typically serve the Church for a two year period. The Tax Service has taken the position that temporary assignments expected to last one year or less will be considered under all the facts and circumstances, that stays of more than one year but less than two will be given a rebuttable presumption that the stay is indefinite, and that an expected or actual stay of two years or more will be considered indefinite and nondeductible regardless of the circumstances. Rev. Rul. 83-82, 1983-1 C.B. 45.

Because we hold that unreimbursed expenses are not deductible by a taxpayer who does not actually render the charitable service, we need not and do not answer the question of whether a missionary is "away from home" for tax purposes.

788, 791, 78 L.Ed. 1348 (1934) ("taxpayer who sustain[s] the loss is the one to whom the deduction shall be allowed"), yet this is exactly what the appellants are attempting.

The appellants rely primarily on *McCollum v. Commissioner*, 37 T.C.M. (C.C.H.) 1817 (1978) and *Rockefeller v. Commissioner*, 676 F.2d 35 (2d Cir.1982), for support for their contention that expenses need not always be incurred by the individual claiming the deduction, but their reliance is misplaced In *McCollum* the taxpayers, husband and wife, and two of their children served on the National Ski Patrol, and were allowed a charitable deduction for the expenses incurred by the family while rendering their services to the National Ski Patrol. In *Rockefeller* the taxpayers employed both their personal staffs and staff of the Rockefeller Family Joint Office in conducting their philanthropic affairs. The Rockefellers deducted as charitable contributions the salaries of the personal and Joint Office employees, as well as travel, entertainment and other expenses incurred by the taxpayers and their employees in connection with their philanthropic activities. Unlike the situation in the present case, the deductions claimed in *McCollum* and by the Rockefellers were for unreimbursed expenses incurred by the taxpayers in rendering services to charities. *Rockefeller*, 676 F.2d at 41-42. In this case the missionary sons were acting independently of their parents and the parents were not rendering their services to the church. We hold that the taxpayer appellants may not deduct the funds they paid to their sons as unreimbursed expenses because the taxpayers were not engaged in charitable service.

CONCLUSION

Public policy demands that statutes governing the deductibility of charitable contributions be given a broad construction, *e.g.*, *Helvering v. Bliss*, 293 U.S. 144, 150-51, 55 S.Ct. 17, 20, 79 L.Ed. 246 (1934), and the general rule of construction is that tax provisions should be construed wherever possible in favor of the taxpayers. *E.g. Burnet v. Niagara Falls Brewing Co.*, 282 U.S. 648, 654, 51 S.Ct. 262, 265, 75 L.Ed. 594 (1931). The statutory system, however, does not provide for a deduction by a taxpayer who does not actually render service to the charity or make a contribution directly to the charity. Even the most liberal of constructions does not mean that statutory words and phrases are to be given meanings unjustified by legislative intent or that express limitations are to be ignored. *Better Business Bureau v. United States*, 326 U.S. 279, 283, 66 S.Ct. 112, 114, 90 L.Ed. 67 (1945). We do not question the high ideals of the Church or the valuable services it performs in connection with its missionary program. We are constrained by the law, however, and it is up to the legislature to provide the remedy that is sought by the appellants. The decision of the lower court is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
D. IDAHO

Civ. No. 85-4106

HAROLD DAVIS AND ENID DAVIS,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

July 15, 1987

Bart M. Davis, Weinpel, Woolf, Just, Combo & Davis, Idaho Falls, Idaho, Wilford W. Kirton, Jr., Raeburn G. Kennard, Robert P. Lunt, Kirton, McConkie & Bushnell, Salt Lake City, Utah, for plaintiffs.

Maurice O. Ellsworth, U.S. Atty., D. Idaho, F. Michael Kovach, Jr., Trial Atty., Tax Div., U.S. Dept. of Justice, Washington, D.C., for defendant.

MEMORANDUM OPINION AND ORDER

RYAN, District Judge.

I. INTRODUCTION

This matter is before the court on cross-motions for summary judgment by the United States and Harold and Enid Davis. This action stems from the Internal

Revenue Service's (IRS) denial of the plaintiffs' claim for charitable contributions based upon expenses they paid for their sons during the sons' missionary service for the Church of Jesus Christ of Latter Day Saints (Mormon Church).

Factual Background

Plaintiffs seek refund of federal income taxes paid for taxable years 1980 and 1981 in the amounts of $1,779.71 and $2,613.10, respectively. These refund claims are based on the plaintiff's claim that the funds they sent to their sons while the sons served as missionaries of the Mormon Church qualify as charitable contributions which are deductible under Section 170 of the Internal Revenue Code of 1954.

Plaintiffs have two sons, Benjamin and Cecil, who were raised as members of the church. In 1979, Benjamin was chosen as a missionary by church officials and notified that he would serve his mission duty in New York. During 1980 and 1981, plaintiffs transferred to Benjamin's personal checking account $3,480.89 and $4,135.00. Benjamin used these moneys to pay for rent, food and transportation while he was on mission. Benjamin also spent approximately $20.00 per month to purchase religious tracts and other materials used in his missionary work. At no time during his mission service did Benjamin receive charitable contributions from third parties which he accepted on behalf of the church and deposited into a church-controlled bank account. Moreover, Benjamin was not required to turn over to the church the funds in his personal account not expended by him when he terminated his mission and returned to Utah. Benjamin had no unexpended funds when he terminated his mission service.

In 1980, Cecil Davis applied to become a missionary for the Mormon Church. Cecil was notified in 1981 that he had been called to missionary service and began serv-

ing his mission in New Zealand. During 1981, plaintiffs transferred to Cecil's personal checking account $1,518.00. Cecil primarily used this money to pay for rent, food and transportation and personal needs while he was on his mission. Cecil spent nothing for religious tracts or materials. As with Benjamin, Cecil never received charitable contributions from third parties which he accepted on behalf of the church and deposited into a church-controlled bank account or did he turn over any of his unexpended funds to the church following termination of his mission.

On April 16, 1984, plaintiffs filed with the Ogden Service Center an amended United States individual income tax return Form 1040X for the years 1980 and 1981, claiming as additional charitable contributions $3,480.39 and $4,882.00 which they paid to their sons during the sons' missionary service. On January 30, 1985, the Service Center advised plaintiffs that no refunds would be granted. Plaintiffs' attorney requested that the claims be disallowed so that this suit could be filed. This was done on April 12, 1985. In September of 1986, plaintiffs filed a second set of amended returns limiting their charitable deductions to the amounts "requested" by the church and correcting the number of dependents claimed for each year.

II. LEGAL ANALYSIS

The federal regulations pertinent to this action are set forth at 26 U.S.C. § 170 and 26 C.F.R. § 1.170A-1. Section 170 of the Internal Revenue Code provides, in part:

> (1) General Rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary . . .
>
> . . . .

> (c) Charitable contribution defined. For the purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—
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> . . . .
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> (2) A corporation, trust, or community chest, fund or foundation—
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> . . . .
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. . . .

26 U.S.C.S. § 170 (1974). The Mormon church is an organization listed on the Internal Revenue Service Publication No. 78, Cumulative List of Organizations, contributions to which are deductible under Section 170.

Title 26 C.F.R. § 1.170A-1, provides in part:

> (a) *Allowance of deduction.* Any charitable contribution, as defined in section 170(c), actually paid during the taxable year is allowable as a deduction in computing taxable income irrespective of the method of accounting employed or of the date on which the contribution is pledged. . . .
>
> . . . .
>
> (g) *Contributions of services.* No deduction is allowable under section 170 for a contribution of services. However, unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution. For example, the cost of a uniform without general utility which is required to be worn in performing donated services is deductible. Similarly, out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. *Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of performing donated serv-*

> *ices also are deductible.* For the purposes of this paragraph, the phrase "while away from home" has the same meaning as that phrase is used for purposes of section 162 and the regulations thereunder. . . . (emphasis added)

Thus, under the applicable provisions of the revenue code and treasury regulations, a taxpayer is permitted to deduct as a charitable contribution payments made "to or for the use of" a qualified charity. This includes "unreimbursed expenditures" which are incurred by the taxpayer while providing services to the particular charity.

Plaintiffs argue, in support of their motion, that the payments they made to support their sons' missionary services were payments "for the use of" the church as set forth in 26 U.S.C. § 170. It is further asserted that those payments qualify as "reasonable expenditures" incurred while providing services to the church.

The position taken by the plaintiffs finds support in two recent federal court opinions from the Tenth and Fifth Circuits. In *White v. United States*, 725 F.2d 1269 (10th Cir.1984), parents of a 19-year-old missionary serving the Mormon Church claimed an income tax deduction under Treasury Regulation 1.170A-1(g) for expenditures they made at the request of the Mormon Church to support their son's missionary work. The Tenth Circuit, in rejecting the government's argument that the church itself must have control over the expenditure of the funds if the donor is to receive the deduction, applied a "primary benefit" test. That is, the court focused on whether the donor's intent was charitable and whether the primary purpose of the expenditure was to further the aims of the charitable organization or simply to benefit the spender. Based upon this test, the court found that when payments by parents are made for part of the costs of necessary travel and for all of the living expenses of a dependent member of the taxpayer's household serving as a full-time church missionary away from home, that the expenditure was deductible because the expenditure primarily served the church.

In *Brinley v. Commissioner of Internal Revenue*, 782 F.2d 1326 (5th Cir.1986), the Fifth Circuit held that the test of whether a parent's contribution to their son's missionary service was deductible was a test of causation; that is, whether the charitable work was the cause of the payment. Under this test, the burden would be on the taxpayer to show that a particular payment primarily benefited a charitable organization and did not simply benefit a particular individual. The court went on to hold that "nothing on the face of § 1.170A-1(g) . . . limit[ed] deductions for expenditures incurred in the rendition of charitable work *to the person who actually performs the service.*" *Id.* at 1332 (emphasis added).

This court, of course, is not bound by the rulings of the Tenth and Fifth Circuits. The Ninth Circuit has had an opportunity to set forth the legal standard that will be applied in determining what is a charitable contribution pursuant to 26 C.F.R. § 1.170A-1(g). In *Babilonia v. Commissioner of Internal Revenue*, 681 F.2d 678 (9th Cir.1982), the circuit applied the "intent" or "motive" test that was set forth in the *White* decision; that is, was the taxpayer's primary motive in performing services to advance personal interest or to advance those of the charitable organization? However, there is an important factual distinction between the *Babilonia* decision and the *White* and *Brinley* decisions. In *Babilonia*, the taxpayers were seeking a charitable deduction pursuant to 26 C.F.R. § 1.170A-1(g) for expenses they personally incurred while performing services for a charity and not for expenses of a third party as in the *White* and *Brinley* cases.

The position of the government is that the primary benefit test is inapplicable in this case because plaintiffs' payments are to third parties. In his dissent in the *Brinley* decision, Judge Robert Hill noted that:

> "With the exception of the majority's opinion [in *Brinley*] and that of the Tenth Circuit in *White*, the case law, including this circuit, has consistently employed the primary benefit test only in those instances where the taxpayer has sought a charitable deduction for his own expenses. . . . *See e.g., Babilonia v. Commissioner*, 681 F.2d 678, 679 (9th Cir. 1982); *Sheffels v. United States*, 264 F.Supp. 85, 89 (E.D.Wash.1967), *aff'd*, 405 F.2d 924 (9th Cir. 1969); *Orr v. United States*, 343 F.2d 553, 557 (5th Cir. 1965). . . ."

Brinley v. Commissioner, 782 F.2d at 1338 (footnote and citations omitted).

Indeed, while Section 1.170A-1(g) does not "expressly" limit deductions for expenditures incurred in the rendition of charitable work to the person actually performing the service, such a limitation is implicit in the language of the regulation. The only individuals who performed donated services "away from home" were the missionary sons, not the parents. This court should not stray from the clear language of the regulation to permit taxpayers, who are not performing the donated services away from home, to claim a charitable deduction pursuant to 26 C.F.R. § 1.170A-1(g).

As noted by Judge Hill in his dissent in *Brinley*, application of the primary benefits test to expenses incurred by an individual *other* than the taxpayer creates incentives for taxpayer abuse. The dissent set forth the following analysis:

> [W]hen the taxpayer deducts another person's expenses, a shifting of deductions occurs that does not occur when the taxpayer deducts his own expenses. Taxpayer parents in high income tax brackets may be tempted to shift their lower income bracket children's deductions to themselves. Without the oversight of the charitable organization, parents could

> contribute larger than necessary amounts to their missionary child and claim the money was contributed to support charitable activities. If a donor can contribute directly to the missionary, the IRS will be forced to investigate the adequacy of the organizational oversight provided by the charity; this places a heavy burden on an already overwhelmed IRS facing reduced investigatory resources. However, if the money must first go to the charity, the charity will see that the money is spent for the benefit of the charity and not an overcontribution for the child's benefit. . . .
>
> [T]he use of the primary benefit test also causes an increased chance of improper double deductions. Both the donor patient [sic] and the missionary child may attempt to deduct the expenses incurred by the child. However, if the money is given to the Church, this potential problem is avoided because the missionary cannot take the deduction since the expenses will not be unreimbursed. Under the majority's position, the IRS will be forced to compare the tax returns of parent sand missionary children to determine if double deductions are impermissibly occurring.

Brinley v. Commissioner, 782 F.2d at 1338.

This court agrees with the *Brinley* dissent that the primary benefit test is not the appropriate test to be applied when a taxpayer attempts to deduct expenses incurred by another. It applies only in those situations where the taxpayer seeks a charitable deduction for his own expenses. The limitation of the primary benefit test to the above situation not only comports with the language of 26 C.F.R. § 1.170A-1(g), but will also serve to prevent the potential taxpayer abuses discussed above.

The appropriate test to be applied when a taxpayer asserts that he has made a payment to another individual

"for the use of" the charitable organization is the control test. *See Winn v. Commissioner*, 595 F.2d 1060 (5th Cir. 1979); *Tripp v. Commissioner*, 337 F.2d 432 (7th Cir. 1964); *Peace v. Commissioner*, 43 T.C. 1 (1964); *Thomason v. Commissioner*, 2 T.C. 441 (1943). Under this test, a donation is "for the use" of the charitable organization when the charity has sufficient possession of the contribution so that it has discretion as to the use to which the donated funds will be put.

In the instant case, it is clear that the missionary sons had true "control" over the funds in question. There was no common pool from which disbursements were made to the Davis boys by the church. Contributions were placed directly in the sons' personal checking accounts by their parents. The particular use to which the funds were put was solely within the power of the missionary. The sons did not have to account for any surplus funds they might receive from their parents or other parties, nor were they required to turn over to the church funds in their personal accounts not expended when the mission was terminated. It appears from the record before the court that the only role the church played in the distribution of the funds to the missionaries was to provide a projected budget range that would be needed for the particular area in which the missionary would be serving. Beyond that information provided by the church, there is no indication that the church was involved in any way in controlling how the missionary's money was spent.

Conclusion

In summary, the court finds that the plaintiffs cannot deduct as "unreimbursed expenses" payments made to their sons while the sons were serving on a Mormon mission. Such unreimbursed expenses may be deducted only by the individual "performing services away from home." Moreover, the taxpayer actually incurrng the expenses must demonstrate that his primary motive in

performing the services was to benefit the charity. *Babilonia v. Commissioner*, 681 F.2d at 679. When a taxpayer asserts that a contribution benefiting a specific individual qualifies as a contribution made "for the use of" a charitable organization, the control test applies. A charity has "control" over a contribution when it has complete discretion as to how those funds will be used. For the reasons stated in this opinion, plaintiffs cannot properly claim a deduction under 26 U.S.C. § 170 or 26 C.F.R. § 1.170-1(g).

III. ORDER

Based upon the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that defendant's Motion for Summary Judgment should be, and is hereby, GRANTED.

IT IS FURTHER ORDERED that plaintiffs' Cross Motion for Summary Judgment should be, and is hereby, DENIED. Judgment will enter accordingly.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 85-4106

HAROLD DAVIS and ENID DAVIS,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

Based upon this court's Memorandum Opinion and Order dated July 15, 1987, and the court being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing against the defendant and that this action be dismissed with prejudice.

DATED this 15 day of July, 1987.

/s/ Harold L. Ryan
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-4170
D.C. No. CV-85-4106-HLR

HAROLD DAVIS; and ENID DAVIS,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

[Filed April 20, 1989]

BEFORE: BROWNING, BRUNETTI, and TROTT, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 85-4106
Tax

HAROLD DAVIS and ENID DAVIS,
Plaintiffs

vs.

UNITED STATES OF AMERICA,
Defendant

AFFIDAVIT OF ELDER
ROBERT L. BACKMAN

STATE OF UTAH
COUNTY OF SALT LAKE ss

ELDER ROBERT L. BACKMAN, having been first duly sworn, deposes and says:

1. I am a member of the First Quorum of Seventy and the Executive Director of the Missionary Department of The Church of Jesus Christ of Latter-day Saints (the Church), which is located at the Church's headquarters in Salt Lake City, Utah. The First Quorum of the Seventy is an ecclesiastical group of Church leaders with general responsibility for the missionary program of the Church. I am authorized to make this affidavit on behalf of the Church, and I have personal knowledge of the matters set forth in this affidavit.

2. The President of the Church has characterized the missionary program as one of the three primary areas of Church activity.

3. Missionaries receive no compensation for their services, although the Church pays for mission-caused out-of-pocket expenses for food, lodging, transportation, religious materials or other mission-related expenses if the missionary does not pay for them himself or does not receive adequate funds directly from another donor in accordance with the Church's request and instructions.

4. A mission is not a prerequisite for any position which will provide income or financial remuneration, either inside or outside the Church. At most, a mission may improve the background of the missionary to serve in uncompensated lay ecclesiastical Church assignments, but it is not required for such assignments.

5. Most missionaries are individuals between the ages of nineteen and twenty-two years, many of whom receive the necessary funds to meet minimal mission expenses from their parents at the request of the Church. The Church advises the missionaries and the parents of the amounts which it believes necessary to obtain the missionary's services at the location in question.

6. The Church encourages every young man to make himself worthy for a mission, and every worthy young man is encouraged to be prepared to accept a mission call from the leadership of the Church when he reaches nineteen years of age.

7. The Church has strict standards for missionaries regarding moral worthiness, testimony, physical, mental and emotional fitness, willingness to obey Church authorities in all matters, desire to serve the Church and others, attitude towards the gospel, willingness to work, etc.

8. If the Church determines that a candidate is qualified to become a missionary, it will send a letter, bearing the signature of the President of the Church, calling the applicant to go on a mission for the Church and requesting the applicant to accept or reject the call in writing. This letter also informs the candidate of the geograph-

ical area where the Church has decided to send the missionary. A second letter from the Missionary Department will provide additional information, including the amount of money which will be needed to obtain the missionary's services.

9. If the candidate accepts the call, the candidate receives priesthood ordinances or blessings by which he is "set apart" to serve as an official missionary and minister of the Church.

10. The Mission President has virtually total control over each missionary's life, including the manner and style of dress, grooming, proselyting and study schedules, and use of time for other activities. Mission rules prohibit dating and certain sports and restrict attending movies, plays and other theatrical events. Other limitations are determined by the Mission President.

11. Missionaries (except for older couples operating under the supervision of the Mission President) are expected to conform to a daily schedule which calls for at least 10 hours per day of actual missionary work in addition to study time, meal time and planning time, as set out on pages 15 and 16 of the Missionary Handbook:

RECOMMENDED DAILY SCHEDULE

The recommended daily schedule is as follows:

6:30 a.m.	Arise
7:00 a.m.	Study Class
8:00 a.m.	Breakfast
8:30 a.m.	Personal Study
9:30 a.m.	Proselyte
12:00 p.m.	Lunch
1:00 p.m.	Proselyte
5:00 p.m.	Dinner
6:00 p.m.	Proselyte
9:30 p.m.	End proselyting—plan tomorrow's activities
10:30 p.m.	Retire—this is a must

12. The foregoing schedule is modified on Sundays to permit attendance at worship services. Once each week, missionaries are allowed up to eight hours for laundry, cleaning, writing home, filling out reports, necessary shopping, and limited recreation within mission rules and supervision. Missionaries are not permitted to take vacations or travel for non-mission purposes.

13. Since missionaries devote their full time to Church service, the expenses incurred incident to their services must be paid from savings or from contributions made by other members. Therefore, the Church actively solicits contributions to its missionary program from its members. Sacrifice for the support of the missionary program is expected not only from the missionary, but from each member of the Church.

14. If the missionary himself is unable to provide all of his own financing, it is the practice of the Church first to ask the missionary's family to contribute the necessary financing for his mission service. The amount requested varies with the costs of the mission area and is determined by the Church in order to encourage frugality by each missionary.

15. If the family is either unable or unwilling to contribute all (or any portion) of the funds necessary, the Church seeks donations from other ward or stake members, through priesthood quorums, or from other Church sources to obtain sufficient funds to pay costs not paid by the missionary himself.

16. If parents or any other individual member is paying the costs incident to a specific missionary's service, the Church prefers the donor to transfer the necessary funds to the personal checking account of the missionary unless a different method of transfer is requested by the Mission President in order to meet specific needs or problems in a local mission.

17. The Church believes that the direct transmittal of money to the missionary results in several specific and important benefits to the Church. In particular, the Church concludes that having the member donate money while the missionary donates service in order to carry out the work of the Lord (each being aware of the other's part) fosters the Church doctrine of sacrifice and consecration in the lives of its people. That doctrine, based on Church scripture, requires members to consecrate and dedicate themselves and their means to the work of the Lord. The Church has found that for parents to pay these contributions directly to the missionaries helps to strengthen and build the family, the primary unit of the Church and the gospel. The Church has also found that direct transmittal assists the Church in minimizing the expenses of its missionaries because the missionaries are more frugal when they are aware of the donor's personal sacrifice to assist in the Lord's missionary work. The Church finds that knowing who bears the financial burden helps remind the missionary that the mission is intended as a period of dedication, service and sacrifice and is not intended as a means of livelihood. Direct transmission of funds in the amounts requested by the Church also reduces the substantial administrative and bookkeeping requirements which would otherwise be imposed upon the Church, thereby preserving the Church's resources for additional charitable and religious activities, including missionary work itself.

18. Missionaries are not free to do whatever they like with the funds received for mission-related expenses. Although it is not practical for missionaries to obtain specific advance approval of each expenditure they make from their personal checking account, the limited amounts available effectively limit their expenditures to mission essentials. Furthermore, missionaries receive specific instructions with respect to the expenditures of these donated funds. For example, the Missionary Handbook provides:

> The money you receive for your support is sacred and should be spent wisely and only for missionary work. Keep expenses at a minimum. . . . Keep a financial record of all expenditures. (p. 29)

These restrictions are repeated in the instructions received at the Missionary Training Center in Provo, Utah and those given by Mission Presidents to the missionaries under their supervision.

19. The Church does not want missionaries to receive missionary expense money or other charitable contributions from third parties other than those (usually the family) whom the Church has requested to provide financial assistance.

20. The amount requested by the Church for each individual missionary varies according to the amount determined to be necessary in the specific mission to which the missionary has been called. This amount is determined by the Mission President of each mission, based on local circumstances and the expenses reported to the Church by other missionaries in the same area.

21. The amount requested is subject to modification in the discretion of the Mission President to take into account changing conditions or special circumstances, such as extra travel expenses incident to certain supervisory positions to which missionaries may be called. It is Church policy to have Mission Presidents increase or decrease the amount requested as necessary in order that the amount requested and the amount donated equals as nearly as possible the actual expenses the missionary will incur to the Church.

22. Surpluses of contributions over expenditures are not contemplated because the monthly amount requested is determined by the Mission President based upon conservative estimates of actual need. Furthermore, if a surplus starts to develop, the missionary is expected to

take action to have the amount of the donation sent to him appropriately reduced.

23. If for any reason expected contributions are not forthcoming from the anticipated sources, the Church assumes the burden of locating other sources of contribution to continue uninterrupted funding of the missionary program. Such additional sources may include other members of the local congregation from which the missionary comes, specific donors from other parts of the Church, or use of Church general missionary funds.

24. The selection of a missionary is not conditioned upon the willingness of any one individual to provide sufficient financial support to the Church program. Although the missionary is welcome to assist the Church officials in finding adequate sources of financial support, Church officials assume ultimate responsibility to locate financial support for every worthy missionary candidate by soliciting contributions from local congregation members, members of other congregations, or seeking general Church missionary funds.

IN WITNESS WHEREOF the affiant hereto sets his hand before the undersigned notary public and acknowledges under penalties of perjury that the foregoing statements are true and accurate to the best of the affiant's knowledge and belief on this 30th day of April, 1987.

/s/ Robert L. Backman
ROBERT L. BACKMAN

/s/ Marilyn H. Pare
Notary Public, Residing at
Salt Lake City, Utah

My Commission Expires: April 15, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 85-4106

HAROLD DAVIS and ENID DAVIS,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

AFFIDAVIT OF HAROLD DAVIS

STATE OF IDAHO
COUNTY OF BONNEVILLE ss.

1. The affiant is a plaintiff in the above-entitled matter.

2. During 1980 plaintiffs' son Benjamin Davis served as a missionary on behalf of The Church of Jesus Christ of Latter-day Saints ("Church"). In 1981 plaintiffs' sons Benjamin Davis and Cecil Davis both served as missionaries on behalf of the Church.

3. Prior to either son serving on a mission, the plaintiff was familiar with the Church's mission program having had previous children serve missions on behalf of the Church, and having received information from Church authorities throughout their lives regarding missionary work.

4. Before each missionary was called to serve a mission, plaintiff agreed to provide to the missionary the amount of money requested by the Church for the appropriate mission in which the missionary would serve.

5. Based on personal experience and Church custom, the plaintiffs knew that the Church would provide specific financial information for each missionary which would define the amount which the missionary should receive.

6. The amount of money which plaintiffs transferred to each missionary's checking account for which a charitable contribution deduction is claimed does not exceed the amount set by the Church.

7. The primary motive of the plaintiffs in providing the amounts requested by the Church was a sincere religious desire to follow the instructions of the Prophet to support the Church's missionary program.

8. The plaintiffs were aware that if they did not provide the necessary expenses incident to the missionary services of their sons that the Church would provide the required money from mission funds maintained by both the ward and stake to which the plaintiffs belong. The plaintiffs had previously contributed to these funds themselves, and knew of both their existence and the Church policy to see that every worthy member serve a mission.

9. The plaintiffs had an understanding with each son that the money sent in accordance with the Church's instructions would be used only in accordance with Church policy for mission expenses.

10. The money transferred by the plaintiffs to the missionaries for which a charitable contribution deduction is claimed was transferred to the missionaries because they were in fact missionaries (as opposed to being merely plaintiffs' sons), was subject to a clear understanding and commitment by the sons that the money would be used only in accordance with Church guidelines for necessary mission-related expenditures and was not intended for the sons to use as they might see fit. If the sons had not been missionaries or if they had not agreed

to use the money in accordance with Church instructions, the plaintiffs would not have provided the money to them.

11. The plaintiffs have received no pecuniary benefit from the contributions made in support of the Church's missionary program.

12. In agreeing to provide the money necessary for mission-related expenses, the plaintiffs knew and understood that the mission president would retain authority to adjust the monthly amount as necessary to reflect changes in mission costs or missionary circumstances such as the use of a car or assignment to higher or lower cost of living areas.

13. Both the method of transfer and the amount transferred to each missionary was in accordance with the instructions received from the Missionary Department of the Church which each missionary forwarded to the plaintiffs.

IN WITNESS WHEREOF this affidavit is executed under penalties of perjury this 15th day of April, 1987.

/s/ Harold Davis
HAROLD DAVIS
Affiant

SUBSCRIBED AND SWORN TO before me on the 16 day of April, 1987.

/s/ Bart M. Davis
Notary Public residing in:

_____

My Commission Expires:

_____

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 85-4106

HAROLD DAVIS and ENID DAVIS,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

UNITED STATES' STATEMENT OF MATERIAL FACT

This statement of material fact is submitted in compliance with this Court's rules. Local Rule 6-106.

1. Plaintiffs seek refunds of federal income taxes paid for taxable years 1980 and 1981 in the amounts of $1,779.71 and $2,613.10, respectively.

2. These refund claims are based on plaintiffs' claim that the funds they sent their sons while the sons served as missionaries of the church of Jesus Christ of Latter-Day Saints (Church) qualify as charitable contributions which are deductible under Section 170 of the Internal Revenue Code of 1954.

3. Plaintiffs are members of the Church of Jesus Christ of the Latter-Day Saints and have been since birth. During 1980 and 1981, plaintiffs and their sons were members of the Idaho Fall 29th Ward, Idaho Fall Ammon West Stake of the Church.

4. Plaintiffs customarily give ten percent of their earnings to the Church, annually, as tithing and have done so for at least the ten years preceding the years at issue. In addition, they have made other contributions to the Church, including fast offerings, Ward budget gifts, and missionary contributions.

5. Plaintiffs have several children including two sons, Benjamin and Cecil, who were raised as members of the Church.

6. Plaintiffs customarily give their sons Christmas and birthday presents which are of a personal nature and not excessive in value. Plaintiffs have done so for at least the ten years preceding the years at issue in this case.

7. The Church was listed in the October 31, 1979 issue of the Cumulative List of Organizations described in Section 170 of the Internal Revenue Code 1954.

8. The Church operates a worldwide missionary program which has involved more than 25,000 missionaries each year since 1977.

9. Mission service is voluntary and the missionary receives no compensation for his services, although the Church will pay for minimal mission-caused out-of-pocket expenses if the missionary does not pay for them himself or receive adequate funds from another donor.

10. The Church encourages but does not require its members to undertake a mission. A mission will not qualify the missionary for any lifetime profession or calling and it is not a prerequisite for any position of income or financial remuneration, either inside or outside the Church.

11. Among the requirements for missionary service are that the person must be at least nineteen years of age and in good physical and emotional health. Missionaries must demonstrate a knowledge of the Church's doctrines and acceptance of its principles. Male missionaries are required to be members of the Melchizedek Priesthood.

12. In 1979, Benjamin Davis, who was then 18 years old, applied to become a missionary. He was interviewed by his ward bishop (local congregation) to determine if he met the Church's standards and submitted to his bishop a medical and dental evaluation prepared by his personal physician and dentist.

13. The bishop determined that Benjamin was morally, spiritually and physically qualified to become a missionary, and prepared a written recommendation which Benjamin signed. The bishop also arranged for a personal interview with the president of the stake (which is similar to a diocese).

14. The stake president also determined that Benjamin was qualified to become a missionary. He signed and submitted to the Missionary Department of the Church the recommendation prepared by the bishop together with the supporting medical and dental evaluations.

15. The papers submitted by the stake president were processed by the Church's Missionary Department, which determined that Benjamin was qualified to become a missionary.

16. The Church notified Benjamin that he had been called to missionary service in a letter signed by Spencer W. Kimball, President of the Church. The letter designated the New York, New York Mission as the area where Benjamin would be assigned to serve and requested Benjamin to report to Odgen, Utah for training. A second letter from the Missionary Department of the Church outlined the items of clothing, provided specific information relating to the New York, New York Mission, and advised Benjamin of the estimated amount of money which would be needed to support his missionary service at the training center and in the mission field.

17. In October of 1979, Benjamin Davis was ordained as an Elder in the Church, set apart as a Minister of

the Gospel and Missionary and sent to the Church's Missionary Training Center in Provo, Utah. At the Training Center, Benjamin was instructed in his duties and responsibilities as a missionary. He received a handbook which instructs missionaries on several aspects of their mission including use of their time, studying, learning, teaching, preaching, and certain other matters. The missionary is expected to refer to and follow the instructions in the handbook throughout the mission.

18. In November of 1979, Benjamin Davis traveled at the direction of the Church from Provo to the New York Mission, where he served as a missionary until December of 1981. He lived with companions and in areas selected by the Mission President, and lived in no single location for more than eight months.

19. By the time he arrived at the New York mission, Benjamin had exhausted his savings, approximately $1,500, having spent the money on clothing, a bicycle, one months living expenses in Provo and his airfare to New York. During 1980 and 1981, plaintiffs transferred to Benjamin's personal checking account, on which he was the sole authorized signatory, $3,480.89 and $4,135.00, respectively.

20. Benjamin Davis used this money primarily to pay for rent ($150 per month), food and transportation while he was on his mission. He spent approximately $20.00 per month to purchase religious tracts and other materials used in his missionary work.

21. Benjamin was not required to and did not seek specific approval of the expenditures he made from his personal checking account.

22. Benjamin never received charitable contributions from third parties which he accepted on behalf of the Church and deposited into a church-controlled bank account.

23. Benjamin Davis was not required to and did not turn over to the Church the funds in his personal account not expended by him when he terminated his mission and returned to Utah. He had no unexpended funds when he terminated his mission, having purchased a camera shortly before leaving New York.

24. In 1980, Cecil Davis applied to become a missionary when he was 18 years old. He, too, was interviewed and recommended by his bishop and stake president.

25. When the Church notified Cecil that he had been called to missionary service in 1981, the Church asked Cecil to serve in the New Zealand-Cook Island Mission. Like Benjamin, Cecil received a second letter giving information about the mission and apprising him of the amount of money needed for mission expenses. Cecil was ordained as an Elder and set apart as a Minister of the Gospel and Missionary in June of 1981.

26. Cecil received eight weeks of training (including language training) at the Mission Training Center in Provo, Utah and reported to the New Zealand Cook Island Mission about August 9, 1981, where he served as a missionary on no single island more than six months.

27. During 1981, plaintiffs transferred to Cecil's personal checking account, on which he was the sole authorized signatory, $1,518.00.

28. Cecil primarily used this money to pay for rent, food and transportation, and personal needs while he was on his mission during 1981. Because of the special nature of the Cook Island mission, Cecil spent nothing for religious tracts or materials.

29. Cecil was not required to and did not seek specific approval of the expenditures he made from his personal checking account.

30. Cecil never received charitable contributions from third parties which he accepted on behalf of the Church and deposited into a church-controlled bank account.

31. Cecil was not required to turn over to the Church the funds in his personal account not expended by him when he terminated his mission and returned to Utah. He had no unexpended funds when he terminated his mission.

32. Neither Cecil nor Benjamin had an independent source of funds aside from their own savings, and their family's support during the period of their missionary service.

33. While on their missions, Benjamin and Cecil lived with and engaged in proselyting activities with one of the several other missionaries selected as their companions by the Mission President.

34. During their missionary service, Benjamin and Cecil were generally expected to conform to a daily schedule which called for at least 10 hours per day of actual missionary work in addition to study time, meal time and planning time.

35. Benjamin's actual proselyting time, which included visiting families from door to door, formally teaching families which invited him into their homes, and member instruction, averaged over 70 hours per week. Benjamin also spent ten or more hours per week in study and preparation time. In addition, on one day per week called "preparation day", Benjamin was allowed up to eight hours to shop for groceries, wash clothing, write letters home and attend to personal matters within the limits of mission rules, such as visiting the Empire State Building.

36. Due to the unique nature of his mission, Cecil's service was more varied than Benjamin's. In addition to tracting, discussions and instructing members, Cecil would work with the natives in their taro swamps and in har-

vesting coconuts, building facilities for Church use and other Church-directed tasks. Cecil was assigned to serve on one island from which he had to be evacuated because of inadequate food supplies.

37. Cecil's actual missionary service time averaged about 60 hours per week, in addition to 15-25 hours per week in study and preparation time. In part, this difference in time reflected the need for daily language study in addition to other studies. Like Benjamin, Cecil was also allowed part of a day of preparation time once a week which was used for shopping, washing, mending clothes, writing and other personal matters.

38. Each week Benjamin and Cecil submitted a report to their Mission President and Zone Leader. The report covered the amount of time spent in Church service, the type of missionary work accomplished and provided space to discuss matters of interest or concern which either boy felt should be called to the attention of the Zone Leaders or the Mission President. It also contained a report of the total expenses for the week and for the month to date. Any expenditures in excess of the permitted amount required detailed explanation to the Mission President. Both boys complied with the Church's instructions.

39. During their missions, neither Benjamin nor Cecil ever received charitable contributions from third parties other than their families. None of the payments were deposited into a Church-controlled bank account. This was consistent with Church policy.

40. Neither Benjamin nor Cecil gave to the Church any funds from his personal account not expended by him when he terminated his mission and returned to Idaho, because neither had any unexpended funds when he terminated his mission.

41. Plaintiffs did not claim as a charitable contribution deduction on their timely filed 1980 and 1981 Joint U.S. Individual Income Tax Returns, forms 1040, the amounts they paid to their sons during their missionary

service. They claimed Benjamin and Cecil as dependents in each of those years, however. True and correct copies of these returns are attached to this statement as Exhibits A and B, respectively.

42. On or about April 16, 1984, plaintiffs filed with the Ogden Service Center Amended U.S. Individual Income Tax Returns, forms 1040X, for the years 1980 and 1981, claiming as additional charitable contributions $3,480.39 and $4,882.00 which they paid to their sons during the sons' missionary service. True and correct copies of those amended returns are attached to this statement as Exhibits C and D, respectively.

43. On January 30, 1985, the Service Center advised plaintiffs that no refunds would be granted. Plaintiffs' attorney requested that the claims be disallowed so that this suit could be filed. This was done on April 12, 1985.

44. Plaintiffs timely filed this refund suit on July 15, 1985.

45. In September of 1986, plaintiffs filed a second set of amended returns, limiting their charitable deductions to the amounts "requested" by the Church and correcting the number of dependents claimed for each year. Copies of those amended returns are attached to this statement as Exhibits E and F.

Dated this 30th day of March, 1987.

MAURICE O. ELLSWORTH
United States Attorney

/s/ F. Michael Kovach, Jr.
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Supreme Court, U.S.
FILED
OCT 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-98

In the Supreme Court of the United States

OCTOBER TERM, 1989

HAROLD DAVIS AND ENID DAVIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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14 pp

QUESTION PRESENTED

Whether amounts paid by petitioners directly to their children to cover their children's living expenses while they served as church missionaries are deductible by petitioners as charitable contributions under Section 170(a) of the Internal Revenue Code (26 U.S.C.).

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-98

HAROLD DAVIS AND ENID DAVIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a), as amended, is reported at 861 F.2d 558. The opinion of the district court (Pet. App. 16a-25a) is reported at 664 F. Supp. 468.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1988. A petition for rehearing was denied on April 20, 1989 (Pet. App. 27a). The petition for a writ of certiorari was filed on July 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners and their sons, Benjamin and Cecil, are active members of the Church of Jesus Christ of Latter-Day Saints (the Church). The Church qualifies as an organization formed and operated for religious and charitable purposes within the meaning of Section 170 of the Internal Revenue Code,[1] which means that contributions "to or for the use of" the Church are tax-deductible. The Church operates a worldwide missionary program, in which more than 25,000 missionaries have participated annually since 1977. Pet. App. 2a, 5a.

In 1979, Benjamin Davis was chosen as a missionary by Church officials and notified that he would serve his duty at the Church's mission in New York City. The Church later provided Benjamin information relating to the New York Mission and advised him of the estimated amount of money that would be needed to support his missionary service. In October 1979, Benjamin was ordained as a missionary, and the next month he traveled to the New York Mission, where he served as a missionary until December 1981. Benjamin's brother, Cecil Davis, was chosen as a missionary in 1981 and assigned to the Church's New Zealand-Cook Island Mission. Cecil was also provided information by the Church regarding his mission and the approximate amount of money he would need for his expenses. In June 1981, Cecil was ordained as a missionary, and that August he reported to the New Zealand-Cook Island Mission for his service as a missionary. Pet. App. 17a-18a, 41a-43a.

During 1980 and 1981, while Benjamin was serving as a missionary in New York, petitioners transferred $3,481 and $4,135, respectively, to his personal checking account.

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

He used these funds primarily to pay for his living expenses, *e.g.*, rent, food, transportation, and personal needs. A small portion of these funds was used to purchase religious materials utilized in his missionary work. During 1981, while Cecil was serving as a missionary, petitioners transferred $1,518 to Cecil's personal checking account. He used these funds to pay for his living expenses. Cecil did not expend any portion of the funds given to him on religious materials. Pet. App. 3a-4a.

Benjamin and Cecil Davis were not required to seek specific Church approval of expenditures made from their personal checking accounts. Each week, however, they submitted a report to their Mission President and Zone Leader, which included, *inter alia*, a listing of the total expenses for the week and for the month to date. They were not required to turn over to the Church any funds in their personal accounts that remained at the end of their missions (Pet. App. 9a). Cecil had no such remaining funds; Benjamin purchased a camera with his remaining funds shortly before he terminated his mission. *Id.* at 3a-4a, 42a-44a.

2. Petitioners timely filed their joint federal income tax returns for 1980 and 1981. On these returns, petitioners claimed Benjamin and Cecil as dependents and did not claim a charitable contribution deduction for the amounts paid to them for their living expenses incurred during their missionary service. In 1984, petitioners filed amended income tax returns, claiming deductible charitable contributions of $3,480 and $4,882 for the support payments made to their sons. The Internal Revenue Service disallowed the refund claims based on these claimed deductions, and petitioners then instituted this refund

suit in the United States District Court for the District of Idaho. Pet. App. 18a, 44a-45a.[2]

The district court granted summary judgment for the government (Pet. App. 16a-25a). The court held that the payments made by petitioners to their sons were not made "to or for the use of" a qualified charity within the meaning of Section 170(a) of the Code and hence were not deductible by the parents. The court explained that a donation that is not made directly to a charitable organization is deductible as being "for the use" of that organization only "when the charity has sufficient possession of the contribution so that it has discretion as to the use to which the donated funds will be put" (Pet. App 24a). The court found that this test was not met here because "[t]he particular use to which the funds were put was solely within the power of the missionary" (*ibid.*). The court added that, apart from providing a "projected budget range," "there is no indication that the church was involved in any way in controlling how the missionary's money was spent" (*ibid.*).

3. The court of appeals affirmed (Pet. App. 1a-15a). The court ruled that, in order for a charitable contribution to be deductible, the recipient charity must have control over the donated funds, so as to ensure that the payment benefits the charity and not a particular individual (*id.* at 9a). In so concluding, the court relied in part on a line of cases holding that taxpayers are not permitted to deduct payments to charities that are earmarked for the benefit of

[2] On their 1984 amended returns, petitioners claimed charitable contributions for amounts in excess of the amount of living expenses that had been estimated by the Church in the letters sent to Benjamin and Cecil concerning their missions. In September 1986, after the refund suit was filed, petitioners filed a second set of amended returns, on which they reduced the amount of their charitable deductions to correspond to the amount specified in the letters and also reduced the number of dependents claimed. Pet. App. 18a, 45a.

particular individuals (*id.* at 7a-8a). The court determined that the funds deposited directly into petitioners' sons' checking accounts did not meet this "control" test, noting that, "[w]hile the Church admonished the missionaries to spend their money wisely, the particular use to which the funds were put was solely within the control of the missionaries" (*id.* at 9a).[3] The court acknowledged that its decision is inconsistent with *Brinley* v. *Commissioner*, 782 F.2d 1326 (5th Cir. 1986), and *White* v. *United States*, 725 F.2d 1269 (10th Cir. 1984), but concluded that those cases were incorrectly decided. See Pet. App. 8a-9a, 11a-13a.

ARGUMENT

The court of appeals correctly held that the payments made by petitioners to support their children during their period of missionary service were not deductible as charitable contributions under Section 170(a) of the Code. We agree with petitioners, however, that the decision below squarely conflicts with the decisions of two other courts of appeals. Moreover, resolution of this conflict is important to the fair and evenhanded administration of the tax laws. Accordingly, we do not oppose the grant of certiorari in this case.

1. Section 170(a) of the Code allows a taxpayer to take an income tax deduction for a "charitable contribution" paid within the taxable year. Section 170(c)(2)(B) includes

[3] Like the district court (see Pet. App. 20a-22a), the court of appeals also rejected petitioners' contention that funds paid to their sons could be deducted as "unreimbursed expenses" incurred incident to the rendition of charitable services within the meaning of Treas. Reg. § 1.170A-1(g) (26 C.F.R.) (*reprinted at* Pet. App. 19a-20a). The court explained that the regulation permits the deduction only of unreimbursed expenses incurred by the person actually rendering charitable services. Pet. App. 10a-14a.

within the definition of "charitable contribution" any contribution or gift "to or for the use of" an organization formed and operated exclusively for religious or charitable purposes. The standard governing the deductibility of amounts claimed as charitable contributions thus has two basic components: one relating to the nature of the payment and the other relating to the nature of the recipient. First, the payment must qualify as a "contribution" or "gift," which excludes payments made with the expectation of a commensurate financial return or quid pro quo. See generally *Hernandez* v. *Commissioner,* 109 S. Ct. 2136, 2143-2144 (1989). Second, the "contribution" or "gift" must be made "to or for the use of" a qualified recipient. See generally 8 J. Mertens, *Law of Federal Income Taxation* § 31.01, at 4-7 (1987); 2 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 35.1.1 (1981).[4] The issue of statutory construction presented in this case concerns the second component of the inquiry: if we assume that petitioners' payments were "contribution[s] or gift[s]", the question is whether they were made "to or for the use of" the Church within the meaning of Section 170(c).

The court of appeals correctly concluded that petitioners' payments to their children were not made "to or for the use" of the Church because the Church "lacked actual control over the funds" (Pet. App. 9a). In situations where a taxpayer has claimed a charitable contribution for funds paid to a charitable organization but earmarked for

[4] Section 170 also places other limitations on the deductibility of payments claimed as charitable contributions. To be deductible, the payment must be made within the taxable year (§ 170(a)(1)), and consist of cash or qualified property (§ 170(e)-(h)) that does not exceed a specified percentage of the taxpayer's income in the year of payment or (where a carryover is permitted) in subsequent years (§ 170(b) and (d)). See *Hernandez* v. *Commissioner,* 109 S. Ct. at 2143 n.6.

a specific individual, the Internal Revenue Service has focused on whether the charity exercises control over the donated funds and has discretion as to their use. See, *e.g.,* Rev. Rul. 62-113, 1962-2 C.B. 10. As noted by the court of appeals, the lower courts generally have embraced this analysis.[5] Petitioners err in asserting (Pet. 12) that this analysis "eviscerates the statutory language"; the control requirement is fully consistent with the text of Section 170. If an organization has no control over certain funds, it cannot "use" them in the ordinary sense of the word. Similarly, if funds are transferred to an individual under circumstances that will not provide an organization with control over their disposition, the funds would not ordinarily be regarded as having been given "for the use of" that organization.[6]

This limitation serves two important and related purposes. First, requiring that the funds be placed within the

[5] See, *e.g., Winn* v. *Commissioner,* 595 F.2d 1060, 1065 (5th Cir. 1979); *Tripp* v. *Commissioner,* 337 F.2d 432, 435, 436 (7th Cir. 1964); *Morey* v. *Riddell,* 205 F. Supp. 918, 921 (S.D. Cal. 1962); *Peace* v. *Commissioner,* 43 T.C. 1, 7-8 (1964). See generally Note, *Does Charity Begin at Home? The Tax Status of a Payment to an Individual as a Charitable Deduction,* 83 Mich. L. Rev. 1428, 1431-1433 (1985).

[6] The legislative history of the Revenue Act of 1921, ch. 136, § 214(a)(11), 42 Stat. 241, which added the phrase "for the use of," discloses that Congress added this phrase for a specific purpose—namely, to overrule a Treasury decision that had denied a deduction for a payment made directly to a trust company for eventual disbursement for charitable purposes. See 61 Cong. Rec. 5294 (1921) (statement of Rep. Green); *Revenue Act of 1921: Hearings Before the Senate Comm. on Finance,* 67th Cong., 1st Sess. 523-526, 530-531 (1921). Thus, the phrase was intended to cover the situation where a payment is made to a nonqualifying corporation to be held in trust for a charitable corporation, with the funds eventually to be disbursed to the charitable corporation. The exceedingly broad reading that petitioners would give to the words "for the use of" goes far beyond Congress's intent and clearly is not necessary to avoid rendering those words superfluous.

control of a qualified recipient serves to ensure that the gift will be used for charitable purposes—which is the premise upon which Congress has determined that such gifts should be tax-deductible. See Rev. Rul. 62-113, *supra*. Second, the control requirement is vital to the ability of the IRS to perform its oversight responsibilities in the charitable contribution area. So long as contributions are deductible only if they are placed within the control of a qualified recipient, the IRS can seek to confirm whether such contributions are actually being used for charitable purposes by examining the activities of a limited number of prequalified charitable recipients. If payments to individuals were to be deductible even where a qualified recipient has no control over the disposition of the funds, however, the IRS could monitor compliance only by auditing a massive number of individual taxpayers.[7] See *Brinley* v. *Commissioner*, 782 F.2d at 1338 (Hill, J., dissenting).

2. Although we believe that the court of appeals correctly rejected petitioners' contentions, we agree with petitioners that there exists a conflict in the circuits on the question presented that warrants the attention of this Court. Two other courts of appeals have held, on essentially identical facts, that payments made by parents to support their missionary children can be deducted as charitable contributions under Section 170. In *White* v. *United States*, *supra*, the Tenth Circuit explicitly rejected the "control" requirement that has been applied by the Commissioner and held that the payments in question

[7] In the context of this case, the difference is between conducting an audit of the Church, in which various items can be spot-checked to determine if funds within the Church's control are being spent for charitable purposes, and auditing each of the 25,000 Church missionaries and their relatives in order to determine whether particular gifts were used for charitable purposes.

were deductible because they were made for the "primary purpose [of] further[ing] the aims" of the Church. See 725 F.2d at 1271-1272. In *Brinley* v. *Commissioner*, *supra*, the Fifth Circuit declined to adopt the "primary purpose" analysis applied by the court of appeals in *White*. The Fifth Circuit, however, reversed the unanimous reviewed decision of the Tax Court that had upheld the Commissioner's denial of the claimed deductions (82 T.C. 932 (1984)), and remanded the case for further proceedings to determine whether the deductions should be allowed under a formulation of the control test different from that applied by the Commissioner and the Tax Court. The court held that the control requirement could be satisfied if the taxpayers showed that the amounts paid to support their children matched a specific request from the Church for those amounts. 782 F.2d at 1335-1336. The court of appeals here, in denying the claimed deductions, specifically rejected the holdings of both of these other courts of appeals. See Pet. App. 8a-9a.

Resolution of this conflict is of considerable administrative importance. Petitioners state (Pet. 2) that the Church has more than 25,000 missionaries from the United States serving worldwide. To the extent the parents of these missionaries provide direct financial support for their children's missionary activities, the issue presented in this case will govern the tax liability of many United States taxpayers. Moreover, the general issue presented here has ramifications beyond the specific context of the Church's missionary program. Accordingly, we do not oppose the grant of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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OCTOBER 1989

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No. 89-98

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HAROLD DAVIS and ENID DAVIS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

85-4106

HAROLD DAVIS and ENID DAVIS,
Plaintiffs

v.

UNITED STATES OF AMERICA,
Defendant

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1985		
July 15	1	COMPLAINT. —Issued Summons
Aug 9	2	Summons—U.S. Atty 7/24/85; Atty General 7/23/85; District Director IRS 7/22/85
Sep 13	3	Answer
1986		
Apr 2	4	Minutes—Status Conf.—matter continued to 7/1; parties to notify by that date if settled or not (MJC)
" "	5	Status Conference Order (MJC) cc:Attys
Dec 15	6	Application of Plfs for Admission Pro Hac Vice of Wilford W. Kirton, Jr., Raeburn G. Kennard, & Robart P. Lunt of KIRTON, McCONKIE and BUSHNELL
" "	7	Consent of Resident Attorney, Bart M. Davis
Dec 16	8	Order admitting Attys Kirton, Kennard and Lunt (MJC) cc:Attys

DATE	NR.	PROCEEDINGS
1987		
Mar 30	9	MOTION of Def for S.J. with attached Statement of Material Facts and Memo (in file on left)
Apr 13	10	Motion of Plfs to Enlarge Time for reply to Def's Motion for S.J.
Apr 17	11	Order granting Plf leave to file its Reply to Def's motion for S.J. and own motion for S.J., supporting affidavits & Memorandum no later than 5/11/87 (MJC) cc:Attys
May 7	12	CROSS MOTION of Plfs for S.J.
" "	13	Statement of Material Facts
" "	14	Affidavit of Elder Robert L. Backman
" "	15	Affidavit of Harold Davis
" "	16	Memo in support
" "	17	Certificate of Service
Jun 10	18	Reply of Def to Plfs' Opp. to Motion for S.J. and Opposition to Plfs' Motion for S.J.
Jun 17	19	Certificate of Mailing of Plfs re Reply to U.S. opposition to Plf's Motion for S.J. and Affidavit of Cecil Davis
" "	20	Affidavit of Cecil Davis
" "	21	Order—case to be reassigned to another District Judge unless parties consent to having case heard before U.S. Magistrate (MJC) cc:Attys
" "	—	Mailed Consent Form with letter
Jun 22	22	Reply of Plfs to Defs' Opp. to Plfs' Motion for S.J.

DATE	NR.	PROCEEDINGS
1987		
Jul 9	23	MINUTE ENTRY—Cross Motions for S.J. & Motion of Plf to allow Mr. Kirton as out of state counsel; Cross-Motions for S.J. under advisement (HLR)
Jul 15	24	MEMORANDUM OPINION AND ORDER granting def's Motion for S.J.; Denying plfs' Cross Motion for S.J. (HLR)
" "	25	JUDGMENT that plfs take nothing against the def and that this action action be dismissed with prejudice (HLR) cc: attys Book 31, Page 154
Sep 11	26	NOTICE OF APPEAL by Plfs Harold and Enid Davis, from judgment of 7/15/87
' 14	—	Certificate of Mail of Appeal to 9th Circuit and attys of record. Also sent copy of docket entries and other pertinent papers.
Sep 18	—	sent copy of notice of appeal, copy of docket entries and reporter's transcript ordering form to Wilford W. Kirton, Jr., 330 South Third East, Salt Lake City, UT 84111-2599

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Case No.: CIV 85-4106

HAROLD DAVIS and ENID DAVIS,
Plaintiffs,

—vs—

THE UNITED STATES OF AMERICA,
Defendant.

VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL

1. Plaintiffs are husband and wife and reside at 1451 S. Woodruff, in the City of Idaho Falls, County of Booneville, State of Idaho. Defendant is the United States of America.

2. This action arises under the provisions of Title 28, Section 1346(a)(1) of the United States Code and Title 26, Section 7422, of the United States Code (I.R.C. § 7422).

3. The Plaintiffs timely filed their income tax returns (Forms 1040) for taxable years 1980 and 1981 with the Internal Revenue Service's Ogden, Utah Service Center. The income tax liability with respect to those taxable years was paid by Plaintiffs as follows:

Year	Tax Withheld	Tax Paid With Return	Total Tax Liability
1980	$21,032.38	$3,553.50	$24,585.88
1981	$21,377.71	$ 664.30	$22,041.47

4. As appears more fully herein, Plaintiffs erred in executing such tax returns and such payments of $24,585.88 for taxable year 1980 and $22,041.47 for taxable year 1981 represent an overpayment of taxes by Plaintiffs as follows:

Year		Overpayment
1980		$1,779.71
1981		$2,613.10
	TOTAL	$4,392.81

5. Plaintiffs erred in executing their income tax returns for the taxable years 1980 and 1981 in that they failed to claim certain items of charitable contributions on Schedule A of their income tax returns for each of the above mentioned years in the following amount.

Year	Amount of Charitable Contributions
1980	$3,480.89
1981	$4,882.00

6. The above-mentioned charitable contributions were in the nature of direct payments for the cost of necessary travel and living expenses of a dependent member of Plaintiffs' household who was serving as a full-time church missionary for The Church of Jesus Christ of Latter-day Saints and which payments directly and primarily furthered and served the aims of said charitable organization.

7. On or about April 15, 1984, Plaintiffs filed with the Internal Revenue Service Center in Ogden, Utah, amended income tax returns (Forms 1040x) for the taxable years 1980 and 1981 and a claim for a refund of the excessive income taxes erroneously collected. On or about April 12, 1985, Plaintiffs received from the Commissioner of Internal Revenue notices of disallowance of their claims. Copies of those notices of disallowance are attached hereto,

marked as Exhibit "A" and Exhibit "B" respectively, and made a part hereof.

8. No part of the sum of $4,392.81, the amount of tax overpaid by Plaintiffs, has been refunded to them.

WHEREFORE, Plaintiffs aver that they are entitled to recover their overpayment in taxes from the Defendant in the amount of $4,392.81, together with interest, costs of suit and attorney's fees and prays the Court to grant the same, and demands a jury to try their case, and prays further for such other and further relief as to this Court may seem proper.

DATED this 12th day of July, 1985.

/s/ Michael J. Sheeley
MICHAEL J. SHEELEY

STATE OF IDAHO)
) ss
COUNTY OF BONNEVILLE)

HAROLD DAVIS and ENID DAVIS, being first duly sworn, depose and say:

That we are the Plaintiffs in the foregoing action, that we have read the within Complaint, know the contents thereof and that the same is true and correct as we verily believe.

/s/ Harold Davis
HAROLD DAVIS

/s/ Enid Davis
ENID DAVIS

SUBSCRIBED AND SWORN to before me this 9th day of May, 1985.

/s/ _____
Notary Public for Idaho
Residing at Idaho Falls
Commission Expires:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

No. CIV 85-4106

HAROLD DAVIS and ENID DAVIS,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

ANSWER OF UNITED STATES

The United States of America answers the complaint filed in this case by denying each and every allegation except as is specifically admitted in the following:

1, 2 and 3. The United States admits the allegations of paragraphs 1, 2 and 3 of the complaint.

4 and 5. The United States denies the allegations of paragraphs 4 and 5 of the complaint.

6. The United States denies the allegations of paragraph 6 for lack of knowledge.

7. The United States admits the allegations of paragraph 7 of the complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 85-4106

HAROLD DAVIS and ENID DAVIS,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

PLAINTIFFS' STATEMENT OF MATERIAL FACTS

This Statement of Material Facts is submitted in compliance with this Court's local Rule 6-106 to supplement the facts set forth in Defendant's Statement of Material Facts filed on or about March 27, 1987. Plaintiffs do not disagree with Defendant's statement except that it was incomplete and paragraph 32 needs to be clarified (neither missionary *used* any source of funds other than their parents', but the Church missionary fund was *available*). The material facts which were omitted from the Defendant's statement are set out as follows:

1. The President of The Church of Jesus Christ of Latter-day Saints has characterized the missionary program as one of the three primary areas of Church activity.

2. The Church will pay for food, lodging, transportation, religious materials, etc. if the missionary does not pay for them himself or receive adequate funds directly from another donor in accordance with the Church's request and instructions.

3. Most missionaries are individuals between the ages of nineteen and twenty-two years, many of whom receive the necessary funds to meet minimal mission expenses from their parents at the request of the Church.

4. The Church encourages every young man to make himself worthy for a mission and every worthy young man is encouraged to be prepared to accept a call to serve on a mission at nineteen years of age.

5. The Church has strict standards for missionaries regarding moral worthiness, desire, testimony, physical fitness, mental fitness, emotional fitness, willingness to obey Church authorities in all matters, desire to serve the Church and others, attitude, willingness to work, etc.

6. If the Church determines that a candidate is qualified to become a missionary, it will send a letter, bearing the signature of the President of the Church, calling the applicant to go on a mission for the Church and requesting the applicant to accept or reject the call in writing. This letter also informs the candidate of the geographical area (selected by the Church) to which the candidate will be sent.

7. If the candidate accepts the call, appropriate priesthood ordinances are performed and the missionary is set apart for his calling by local Church officials.

8. Prior to each mission the Plaintiffs had notified their bishop that they would provide the funds requested by the Church to meet the mission expenses of both Benjamin and Cecil. It was understood that each Mission President would retain authority to adjust the monthly amount requested of the Plaintiffs to reflect changes in costs or changes in the missionary's circumstances, such as use of a car or assignment to higher or lower cost of living areas.

9. Neither Benjamin's nor Cecil's selection was, however, conditioned upon the Plaintiff's agreement to provide the necessary finances in response to the Church's

request. The Plaintiffs were aware that if they failed to assist the missionary program the Church would provide the necessary money by either locating another donor or using money donated to the missionary funds maintained by both the Plaintiffs' ward and stake.

10. The Plaintiffs' primary motivation was to assist the Church's missionary program in accordance with Church practice and policies. They did not expect, and did not receive, any pecuniary benefit from their payments of mission related expenses.

11. Each missionary received a letter from the Missionary Department of the Church which set out the amount of money which would be needed to obtain each missionary's service.

12. During their missionary service, their Mission President had almost total control over their life, including their manner and style of dress, grooming, proselyting and study schedules, and use of time for other activities. Mission rules included a ban on dating, movies, plays, certain sports and various other activities.

13. The missionary's basic daily schedule as set out on pages 15 and 16 of the Missionary Handbook is as follows:

RECOMMENDED DAILY SCHEDULE

The recommended daily schedule is as follows:

6:30 a.m.	Arise
7:00 a.m.	Study Class
8:00 a.m.	Breakfast
8:30 a.m.	Personal Study
9:30 a.m.	Proselyte
12:00 p.m.	Lunch
1:00 p.m.	Proselyte
5:00 p.m.	Dinner
6:00 p.m.	Proselyte
9:30 p.m.	End proselyting—plan tomorrow's activities
10:30 p.m.	Retire—this is a must

14. Both Benjamin and Cecil presented themselves full-time, in public and in private as ministers of the Church. Both of them were viewed as ministers by the public in the communities where they served. Their principal activity for 60-70 hours per week for the full terms of their respective missions consisted of devoted missionary service to their Church and to individuals and families.

15. Missionaries are not allowed to take vacations or travel for personal purposes, and neither Benjamin nor Cecil took a vacation or traveled for personal purposes while on their missions.

16. If parents or any other individual member is paying the costs incident to a specific missionary's service, the Church prefers the donor to transfer the necessary funds to the personal checking account of the missionary unless a different method of transfer is requested by the Mission President in order to meet specific needs or problems in a local mission.

17. The plaintiffs' transfer of the aforesaid funds to the personal checking account of each missionary was in accordance with the instructions of the Church.

18. The Church believes that the direct transmittal of money to the missionary results in several specific benefits to the Church, which it regards as important. In particular, the Church concludes that having the member donate money while the missionary donates service in order to carry out the work of the Lord (each being aware of the other's part), fosters the Church doctrine of sacrifice and consecration in the lives of its people. The Church has found that it helps to strengthen and build the family, the primary unit of the Church. The Church has also found that direct transmittal assists the Church in minimizing the expenses of its missionaries because the missionaries are more frugal when they are aware of the personal sacrifice which is made by the donor in order to assist in the Lord's missionary work.

The Church finds that knowing who bears the financial burden helps remind the missionary that the mission is intended as a period of dedication, service and sacrifice and is not intended as a means of livelihood. Direct transmission of funds, in the amounts requested by the Church, also reduces the substantial administrative and bookkeeping requirements which would otherwise be imposed upon the Church, thereby preserving the Church's resources for additional charitable and religious activities.

19. Missionaries are not free to do whatever they like with the funds received for mission-related expenses. Although it is not practical for missionaries to obtain specific approval for each expenditure they make from their personal checking account, the limited amounts available effectively limit their expenditures to mission essentials. Furthermore, missionaries receive specific instructions with respect to the expenditures of these donated funds. For example, page 29 of the Missionary Handbook provides:

> The money you receive for your support is sacred and should be spent wisely and only for missionary work. Keep expenses at a minimum. . . . Keep a financial record of all expenditures.

These restrictions are repeated in the instructions received at the MTC and again from time to time by Mission Presidents to the missionaries under their supervision.

20. The missionaries had made a commitment with the plaintiffs to use the money for which a deduction is claimed only in accordance with the Church's instructions.

21. The Church does not want missionaries to receive missionary expense money or other charitable contributions from third parties other than those (usually the family) whom the Church has requested to provide financial assistance.

22. If for any reason expected contributions are not forthcoming from the anticipated sources, the Church assumes the burden of locating other sources of contribution to continue uninterrupted funding of the missionary program. Such additional sources may include other members of the local congregation from which the missionary comes, specific donors from other parts of the Church, or use of Church general missionary funds.

23. The selection of a missionary is not conditioned upon the willingness of any one individual to provide sufficient financial support to the Church program. Although the missionary is welcome to assist the Church officials in finding adequate sources of financial support, Church officials assume ultimate responsibility to locate financial support for every worthy candidate by soliciting contributions from local congregation members, members of other congregations, or seeking general Church missionary funds.

DATED this —— day of May, 1987.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 85-4106

HAROLD DAVIS and ENID DAVIS,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

AFFIDAVIT OF CECIL DAVIS

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

The undersigned affiant, Cecil Davis, having first been duly sworn, hereby affirms to the Court as follows:

1. I am a son of the plaintiffs, Harold and Enid Davis.

2. During 1981 the plaintiffs provided support for me at Brigham Young University and at their home until I entered the Missionary Training Center of The Church of Jesus Christ of Latter-Day Saints ("Church") on or about June 11, 1981. For the balance of the year I served as a missionary under the control and direction of the Church.

3. The plaintiffs supported me during 1981 by providing $485 of tuition for the spring semester (January through April 15) at Brigham Young University, campus room and board during the same period of $770, books in approximately the amount of $150, spending money at school in the amount of $280, and clothing in the amount

of not less than $500. In addition, plaintiffs provided me with food, housing, spending allowance and medical and dental care during two months (including removal of four teeth and other dental work in preparation for my mission), all of which I firmly believe had a value of not less than $1,000, making the total support provided by plaintiffs during 1981 at least $3,185.

4. In addition thereto, I provided not more than $1,035 of my own support from savings and earnings and received $1,418 of support while serving as a missionary on behalf of the Church (the plaintiffs also paid $100 for transportation which I regard as a Church expense and not part of my support) for a total of not more than $2,453 in support provided by or on behalf of parties other than the plaintiffs.

5. Based on the my belief that the foregoing numbers are true and correct. I state that my parents provided not less than $732 more support than I received from all other sources including myself and the Church.

6. I reaffirm statements of my deposition that the mission was voluntary, and that I was not under any compulsion from my parents to serve the Church as a missionary.

7. My primary and overriding motive for serving on the mission was to provide services to my Church in accordance with my religious beliefs and the instructions of the Prophet that every worthy male is to serve a mission.

8. I further state that the amount of money I received from the plaintiffs for attendance at the Missionary Training Center in Provo and while serving on my mission was in accordance with the amount requested by the Church.

IN WITNESS WHEREOF this affidavit is executed under penalties of perjury this 1st day of May, 1987.

/s/ Cecil Davis
CECIL DAVIS
Affiant

SUBSCRIBED AND SWORN TO before me by Cecil Davis on the 1st day of May, 1987.

My Commission Expires:
Sept. 1, 1989

/s/ Ramona R. Mann
Notary Public residing in:
West Valley City, Utah

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil Case No. CIV 85-4106

HAROLD DAVIS and ENID DAVIS,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

DEPOSITION OF
BENJAMIN LAWRENCE DAVIS

November 6, 1986
Thursday—10:20 a.m.
Room 306, Utah County Building
Provo, Utah County, Utah 84601

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• • • •

[23] Q Were there any other expenditures of that nature, that you can recall?

A Well, right toward the end of my mission I purchased a camera. But that was the last week I was in the mission field. I wrote home and asked my dad if there was any way I could purchase something else, just so I could say I had purchased something in New York and bring it home. And so he sent me some excess money there.

Q About how much did you spend for food, do you recall?

A I recall we both spent about $20.00—it depended on the companion, as to how much we wanted to eat, of course. But I think it was about $20.00 a week that we both chipped in. So between the two of us we paid about $40.00 together.

Q You paid $40.00 together?

A Yes.

Q So your share was $20.00 a week, approximately?

A Yes.

Q And that varied a little bit, I take it, throughout your mission?

A Yes. There was some months when it was lower, and other months when it was higher.

• • • •

[40] MR. LUNT: I had some questions before I left. I don't know whether you have covered it or not.

MR. KIRTON: I don't have any questions.

MR. LUNT: I maybe have a little advantage, because I know somewhat the Church procedure a little bit better.

EXAMINATION

BY MR. ROBERT P. LUNT:

Q When you got your mission call, did you receive a second letter from the Missionary Department—let me

ask you about your mission call. That came from the President of the Church?

A Yes, from the President of the Church. And then I got a letter from the mission president saying, "We welcome you to this mission." And also I think I also received a letter from the mission home here in Provo.

Q So you received letters from the Missionary Department that had both of those letters in it?

A Yes. It indicated what I needed. How many shirts and ties and so forth.

Q So you recall whether or not they indicated how much money would would need to pay for the rent at the mission home?

A Yes.

[41] Q So that letter did have some amount in it—in the second letter? When you said there was no money mentioned, you're talking about the first letter that the Church President sent you, rather than the letter you got from the Missionary Department or a letter that came from the mission president?

Didn't they give you an indication in that letter as to how much per month you would need?

A Yes. It said a range. I'm talking about the mission president in New York. He said it ranged from a certain amount to a certain amount.

Q Did he tell you why it would range a certain amount?

A He said it depended on whether you had a car, or whether you were on a bike, or whether you were in New York or travelling on the subway. He just said it all depended.

Q But they did set amounts that you were to receive, depending upon where you eventually assigned once you got to the mission field?

A Yes.

Q You also said that at least monthly, as I recall your statement, but you didn't remember whether it was

weekly or monthly, but at least monthly, you reported all of your expenditures to the mission president?

A Yes. In fact, what I think it was was weekly. [42] We wrote down what we had spent up to that point, and then after the final week, you wrote down how much you had spent during that month. You wrote up-to-date how much you had spent during that month.

Q Each week you would get a month-to-date number?

A Yes.

Q And that would tell you how much you had spent?

A Yes.

Q And if it was more than the amount within the range he had set for your circumstance, then you had to account specifically to the mission president?

A What you had spent it on, yes.

Q Do you know what the term "per diem" means?

A Pardon?

Q Are you familiar with the term "per diem"?

A No.

Q That means an amount of money per interval of time. And I think probably it means per day. But what they said is, if you kept your expenditures to a certain amount, you were allowed some discretion, but they supervised you very closely if you went above that amount each month?

A They supervised it closely, yes.

Q Did you have any concern of what would happen if your father stopped providing you with money while you were on your mission?

[43] A Did I have a concern?

Q I don't assume that you stayed up nights worrying about the fact that your father would not provide the money that you were expecting?

A I worried at the end of the month as to whether I would be able to go out and buy food, yes. But I knew I had so much money coming in a month, and I couldn't

write home and say, "I need more money," because I knew I was putting my father out.

Q And was the amount he sent you each month related to the amount which the mission president had requested?

A Yes. It fell in that category of the maximum and minimum amount.

Q Depending on where you had been assigned, and in accordance with the mission rules?

A Yes.

Q He was sending you a certain amount—well, I guess what I was asking is, if your father had been, for some reasons that you don't know, if he had been suddenly disabled, would the Church have provided money for your mission if your parents had suddenly become unable to provide money for your mission?

A I imagine they would; I dont' know for sure.

• • • •

Supreme Court, U.S.
FILED
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No. 89-98

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

HAROLD DAVIS and ENID DAVIS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

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December 28, 1989

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QUESTION PRESENTED

Whether taxpayers' donations sent directly to an ordained missionary of a church are deductible as charitable contributions under 26 U.S.C. § 170, where such donations are made at the request and under the direction of the missionary's church, in amounts specified by the church, and with the primary purpose and effect of benefitting the church's missionary effort.

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Beckovsky v. *Burton Abstract & Title Co.*, 208 Mich. 224, 175 N.W. 235 (1919)	17
Board of Educ. v. *Fred L. Ockerlund, Jr. & Associates, Inc.*, 165 Ill. App. 3d 439, 519 N.E.2d 95 (Ill. App. Ct. 1988)	17
Bob Jones University v. *United States*, 461 U.S. 574 (1983)	27
Bradshaw v. *Mutual Life Ins. Co.*, 205 N.Y. 467, 98 N.E. 851 (1912)	18
Brinley v. *Commissioner*, 782 F.2d 1326 (5th Cir. 1986)	*passim*
Calamari v. *Grace*, 469 N.Y.S.2d 942, 98 A.D.2d 74 (N.Y. App. Div. 1983)	17
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Greer v. *Commissioner*, 70 T.C. 294 (1978), *aff'd*, 634 F.2d 1044 (6th Cir. 1980)	41
Haak v. *United States*, 451 F. Supp. 1087, 78-1 USTC § 9364 (Mich. 1978)	33
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Helvering v. *Bliss*, 293 U.S. 144 (1934)	14

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Kurtz v. *Lawrence*, 269 Pa. 22, 112 A. 83 (1920)	18
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Loucks v. *Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (N.Y. 1918)	18
Matsushita Elec. Indus. Corp. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986)	29
Mayo v. *Commissioner*, 30 T.C.M. (CCH) 505 (1971)	25
McAllister v. *Long*, 206 Okla. 623, 246 P.2d 352 (1952)	25
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North Dakota v. *United States*, 460 U.S. 300 (1983)	23
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Resnik v. *Curtis and Davis, Architects and Planners, Inc.*, 58 Ill.App.3d 28, 373 N.E.2d 772 (Ill. App. Ct. 1978), *aff'd and remanded*, 400 N.E.2d 918 (1980)	17

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Rockefeller v. *Commissioner*, 676 F.2d 35 (2d Cir. 1982)	8, 22, 36
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Salt v. *Commissioner*, 18 T.C. 182 (1952)	36
Sampson v. *Commissioner*, 43 T.C.M. (CCH) 1408 (1982)	31
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Smith v. *Commissioner*, 60 T.C. 988 (1973)	31, 36
Southern Ohio State Exec. Offices of Church of God v. *Fairborn Church of God*, No. 88-71 (Ohio Ct. App. March 29, 1989) (LEXIS, States library, Ohio file)	18
Thomason v. *Commissioner*, 2 T.C. 441 (1943)	17, 25, 33
In re Thurman, 225 A.D. 889 (N.Y. App. Div. 1929)	19
Tilles v. *Commissioner*, 38 B.T.A. 545 (1938), *aff'd*, 113 F.2d 907, *cert. denied*, 311 U.S. 703 (1940)	33
Tripp v. *Commissioner*, 337 F.2d 432 (7th Cir. 1964)	33, 34
United States v. *Ron Pair Enters.*, 109 S.Ct. 1026 (1989)	23
United States v. *Menasche*, 348 U.S. 528 (1955)	16
Upham v. *Commissioner*, 16 B.T.A. 950 (1929)	31
Victoria Bank & Trust Co. v. *Cooley*, 417 S.W.2d 814 (Tex. Civ. App. 1967)	18, 19
Wales v. *Mower*, 44 Colo. 146, 96 P. 971 (1908)	41
White v. *United States*, 725 F.2d 1269 (10th Cir. 1984)	*passim*
Winn v. *Commissioner*, 595 F.2d 1060 (5th Cir. 1979)	22
Wolfe v. *McCaughn*, 5 F. Supp. 407 (E.D. Pa. 1933)	31

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O.D. 669, 3 C.B. 187 (1920) 20
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Rev. Rul. 58-279, 1958-1 C.B. 145 22
Rev. Rul. 62-113, 1962-1 C.B. 10 43
Rev. Rul. 71-247, 1971-1 C.B. 54 32
Rev. Rul. 80-45, 1980-1 C.B. 54 22
Rev. Rul. 83-82, 1983-1 C.B. 45 32
Rev. Rul. 84-61, 1984-1 C.B. 39 ..... 8, 31

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26 C.F.R. § 1.170A-1(g) ..... passim
26 U.S.C. § 170 ..... passim
28 U.S.C. § 1254(1) 1
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H.R. No. 1337, 83rd Cong. 2d Sess., *reprinted in* 1954 U.S. Code Cong. & Admin. News 4025 21

LEGISLATIVE MATERIALS

H.R. 8245 Before the Senate Comm. on Finance, 67th Cong., 1st Sess. (1921) 21
H.R. Rep. No. 350, 67th Cong., 1st Sess. (1921) (House Comm. on Ways and Means) 20
H.R. Rep. No. 426, 99th Cong., 1st Sess. (1985) 37
General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, 98th Cong., 2d Sess. (1984) 37

OTHER AUTHORITIES

B. Bittker, *Federal Taxation of Income, Estates and Gifts* (1981) 14
Black's Law Dictionary (5th ed. 1979) 19, 24, 25
G. Bogert, *The Law of Trusts and Trustees* (rev. 2d ed. 1984) 18, 19, 20, 29
Corbin on Contracts (one volume ed. 1952) 17, 19, 20
91 C.J.S. § 515 (1977) 25

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J. Mertens, *Law of Federal Income Taxation* (1982) 41
Restatement (Second) of Agency (1958) 38, 41
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Sutherland Stat. Const. (4th ed. 1984) 16
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-98

HAROLD DAVIS and ENID DAVIS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a), as amended, is reported at 861 F.2d 558 (9th Cir. 1988). The opinion of the district court (Pet. App. 16a-25a) is reported at 664 F. Supp. 468 (D. Id. 1987).

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1988, and an amended opinion was issued on February 21, 1989. Pet. App. 1a. Rehearing was denied on April 20, 1989. Pet. App. 27a. The petition for a writ of certiorari was filed on July 19, 1989, and the petition was granted on November 6, 1989. This Court has jurisdiction under 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

Section 170 of the Internal Revenue Code of 1954, as amended, provides, in relevant part:

(a) Allowance of deduction.

(1) General rule. There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. . . .

(c) Charitable contribution defined.

For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

(2) A corporation, trust or community chest, fund, or foundation—

(B) Organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, ...

26 U.S.C. § 170.

Treasury Regulation 1.170A-1(g) provides, in relevant part:

(g) No deduction is allowable under Section 170 for a contribution of services. However, unreimbursed expenditures made incident to the rendition of services to an organization contributions for which are deductible may constitute a deductible contribution. For example, . . . out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of performing donated services also are deductible. For the purposes of this paragraph, the phrase "while away from home" has the same meaning as that phrase is used for purposes of Section 162 and the regulations thereunder.

26 C.F.R. § 1.170A-1(g) (1989).

STATEMENT

1. Petitioners, Harold and Enid Davis, who reside in Idaho, are and were at all times relevant to this case members of The Church of Jesus Christ of Latter-day Saints (the "Church"), also known as the Mormon Church. The Church is a recognized tax-exempt organization. Pet. App. 39a. As one of its primary functions, the Church has for 160 years operated a missionary program with unpaid, full-time volunteers serving as missionaries. Inasmuch as these missionaries serve as emissaries and ministers of the Church to the people in their mission areas, they are selected according to strict standards of moral worthiness, faith, commitment, obedience and emotional fitness. Pet. App. 29a, 39a.

During the period relevant to this litigation, two of petitioners' sons—Benjamin and Cecil—were authorized to serve as church missionaries. In 1979, Benjamin Davis was interviewed by his Bishop (a leader of a local congregation) and by his Stake President (a leader of several local congregations) who determined that Benjamin was worthy and suitable to serve as a missionary for the Church. These Church officers then submitted written recommendations to Church headquarters that Benjamin be "called" or appointed as a full-time missionary. Thereafter, the President of the Church sent a letter to Benjamin calling him to serve for two years as a missionary in the New York Mission. After Benjamin accepted the call he was ordained an Elder, missionary and minister of the Church and sent to the Church's Missionary Training Center in Provo, Utah for two weeks of instruction and training. He then travelled to New York, where he labored as a missionary until December 1981. During that time, he lived and served in various areas selected by his Mission President (a leader responsible for full-time missionary operations in a particular region), but never resided for more than eight months in any single location. Pet. App. 17a, 40a-41a.

In a similar manner, Cecil Davis was called by the Church to serve as a missionary in the New Zealand Cook Islands Mission. He also accepted his call in writing and was subsequently ordained an Elder, minister and missionary of the Church. After attending the Mission-

ary Training Center, Cecil was sent to the Cook Islands in 1981, where he served for eighteen months. Pet. App. 18a, 42a. Pursuant to instructions of his mission president, Cecil never resided for any longer than six months on a single island. Pet. App. 42a.

While serving as missionaries, Benjamin and Cecil were not allowed to take vacations or to travel for personal purposes, and neither did so. Instead, they were expected to, and did, conform to a daily schedule which called for at least 10 hours per day of missionary work in addition to study time, meal time and planning time. Pet. App. 30a. Benjamin averaged over 70 hours per week of missionary work plus 10 hours per week of study and preparation. Cecil averaged 60 hours per week of missionary work plus 10 to 25 hours per week of study, including language study. Pet. App. 43a-44a. In pursuing their missionary activities, Benjamin and Cecil always presented themselves to the public as ordained ministers and agents of the Church, which is what they were. J.A. 12.

Throughout their missions, Benjamin and Cecil were subject to the direct supervision and control of their mission presidents and other Church leaders, who set rules governing their proselyting schedules, dress and grooming habits, theological and language training and other activities. Mission rules prohibited, among other things, dating, watching movies and plays and participating in certain sports. Pet. App. 3a, 30a.

2. Prior to being called to missionary service, neither Benjamin nor Cecil had saved sufficient money to pay all the costs of his mission. In such cases, it is and has long been the practice of the Church first to ask a missionary's family to contribute the necessary financing. Pet. App. 2a, 31a. If a missionary's family is unable or unwilling to contribute the necessary funds, the Church seeks donations from other Church members living in the same community as the missionary, or supplies funds

from other Church sources, so that all prospective missionaries who are willing and eligible are able to serve. Pet. App. 31a. The Church, in short, assumes final responsibility for the mission-related expenses of each missionary. Pet. App. 31a, 34a.

In this case, petitioners paid virtually all of the expenses of their sons' missions. During 1980 and 1981, petitioners donated a total of $4135 to support Benjamin's full-time missionary labors in New York, and during 1981, they donated $1518 to support Cecil's missionary work in the Cook Islands. Pet. App. 3a. Petitioners' undisputed motivation in making these contributions was "a sincere religious desire to . . . support the Church's missionary program." Pet. App. 36a.

In accordance with the Church's request, petitioners sent their contributions directly to their sons. Pet. App. 36a. When a parent or any other member of the Church donates money to defray a missionary's expenses, the Church strongly prefers that the donor send the funds directly to the missionary. Pet. App. 31a-32a. Through a century and a half of experience with its missionary program, the Church has determined that this direct transmittal of contributions has produced several specific and important benefits to the Church and its members. First, direct transmittal fosters commitment and frugality among the Church's missionaries by making them more aware of the personal sacrifices being made by the donors. Pet. App. 32a; Brief of the Church of Jesus Christ of Latter-day Saints as *Amicus Curiae* at 13. ("Brief of *Amicus Curiae*"). Knowing that his or her family bears the financial burden of a missionary's service helps to remind the missionary that the mission is a period of personal dedication, service and sacrifice. Second, direct transmittal makes the donor feel more a part of the missionary's efforts, thereby fostering and rein-

forcing the spirit of mutual sacrifice that is central to Church doctrine. Pet. App. 32a; Brief of *Amicus Curiae* at 12. This sharing in the missionary effort is particularly valuable when the missionary is a member of the donor's family. Third, direct transmittal helps preserve the venerable tradition of an unpaid lay ministry. See Brief of *Amicus Curiae* at 5. Fourth, direct transmittal reduces the risk of tax and visa problems in foreign countries. *Id.* at 13. Fifth, direct transmittal reduces the substantial administrative and bookkeeping requirements that otherwise would be imposed on the Church, thereby preserving the Church's resources for additional charitable and religious work. Pet. App. 3a, 32a; Brief of *Amicus Curiae* at 13.

The Church exercises substantial control over direct missionary donations at two levels. First, the Church specifies the amount each missionary will need and, accordingly, the amount that donors will be requested to contribute. Pet. App. 2a, 29a, 33a. The amounts requested depend upon living costs in each mission area and are set at a level that requires each missionary to be frugal. Pet. App. 32a-33a. Indeed, the Church has always encouraged frugality in order to lessen the financial burden on Church members, and because, in the Church's experience, frugality increases the dedication and effectiveness of its missionaries and promotes harmony between missionary companions. See Pet. App. 30a-31a; Brief of *Amicus Curiae* at 5. In short, the Church has found that its missionaries are most effective in their service when their expenditures are kept within the limits specified by the Church.

Second, the Church exercises substantial control over the expenditures actually made by individual missionaries. Missionaries are given specific instructions with respect to the expenditures of donated funds and are required to keep financial records of all expenditures. These financial instructions are given to each missionary on numerous occasions and are printed in a handbook that each missionary carries at all times. Pet. App. 32a-33a. To ensure that these instructions are followed, each missionary is required to submit a weekly report to his or her Mission President listing, among other things, all of his or her expenditures. Pet. App. 3a, 44a. Moreover, the Church, through the Mission President and other mission leaders, actively supervises the missionary's day-to-day activities, thereby giving the Church substantial indirect control over a missionary's expenditures.[1]

The control exercised by the Church over missionary donations is well illustrated in the present case. Shortly after each of the petitioners' sons was called as a missionary, the Church sent a letter specifying the expected level of expenses for each mission. Based on Church custom and practice, petitioners understood that these letters were intended by the Church to establish amounts that the Church desired each missionary to receive. Pet. App. 36a. Prior to the commencement of each mission, petitioners notified their bishop that they would provide the funds requested by the Church. J.A. 10. Moreover, petitioners' sons were informed, and frequently reminded, that the Church had requested that their parents (or other supporters) send them a fixed amount each month to cover only mission expenses. J.A. 12-13. In each case, the Church adjusted the specified amount as circumstances changed. See Pet. App. 37a. The amount specified for Benjamin's mission to New York averaged $290 per month in 1980 and $350 per month in 1981 (see Pet. App. 41a), and the amount specified for Cecil's mission to the Cook Islands averaged $225 per month in 1981 (see Pet. App. 42a). The charitable contribution deduc-

[1] Obviously, the Church also retains the ability to send the missionary home if he or she refuses to comply with Church policy regarding financial or other matters.

tions at issue in this case did not exceed the amounts set by the Church. Pet. App. 4a, 36a. Both missionaries in this case, moreover, made a commitment to petitioners to use the missionary funds only in accordance with the Church's instructions. Pet. App. 36a. Finally, both missionaries completed weekly reports detailing their expenditures. Pet. App. 44a. In sum, the amounts donated, the method of payment and the expenditure of donated funds were all in accordance with the requests of the Church.

3. Petitioners initially filed their income tax returns for taxable years 1980 and 1981 without claiming as charitable contribution deductions the amounts paid to finance the missionary services of their sons. In 1984, the Tenth Circuit held in *White* v. *United States*, 725 F.2d 1269, 1272 (10th Cir. 1984), that identical contributions were deductible as charitable contributions under 26 U.S.C. § 170, as long as those contributions primarily benefitted the charitable organization. Section 170 provides a deduction for contributions made "to or for the use of" a qualified charitable organization. Without deciding whether the contributions at issue were "to" or "for the use of" the Church (725 F.2d at 1270), the Tenth Circuit held that such contributions fall within Treasury Regulation 1.170A-1(g) ("Regulation (g)"), which was promulgated under Section 170. 725 F.2d at 1270. Regulation (g) permits a taxpayer to deduct as a charitable contribution "unreimbursed expenditures made incident to the rendition of services" to a qualified charitable organization. 26 C.F.R. 1.170A-1(g) (1989). The IRS treats unreimbursed expenditures deductible under Regulation (g) as contributions "to" the charity. See Rev. Rul. 84-61, 1984-1 C.B. 39; see also *Rockefeller* v. *Commissioner*, 676 F.2d 35, 37-39 (2d Cir. 1982).

In light of the *White* decision, petitioners amended their returns and filed a claim for refund with the Internal Revenue Service. When their claim was denied,

petitioners filed a refund action in the United States District Court for the District of Idaho.

While the case was pending before the district court, the Fifth Circuit ruled in *Brinley* v. *Commissioner*, 782 F.2d 1326 (5th Cir. 1986), that contributions transmitted directly to the Church's missionaries are "for the use of" the Church within the meaning of Section 170 and therefore are fully deductible provided that the Church exercises reasonable control over the contributions. *Id.* at 1334. The Fifth Circuit held that such control would be established if the taxpayer could show that the Church requested that a specified amount of money be sent to a missionary, that the taxpayer responded to that request [illegible] that the amount claimed as a deduction did not exceed the amount specified by the Church. *Id.* at 1335-36. According to that court, "full control [of the funds] [illegible] of actual or physical possession" is not required. *Id.* at 1335.[3]

The district court below expressly declined to follow either the Fifth or the Tenth Circuit's interpretations of Section 170 and Regulation (g) (Pet. App. 21a), and entered summary judgment in favor of the United States. The court concluded that a contribution by a third party to defray the costs incurred by a missionary of the Church is not "for the use of" the Church within the meaning of Section 170—and is therefore not deductible as a charitable contribution—unless the Church exercises control amounting to "possession of the contribution." Pet. App. 24a. The court also concluded that Regulation (g) applies only to unreimbursed expenses incurred in connection with the taxpayer's *own* service to a charitable organization, and therefore held that it does not apply to the contributions at issue here. Pet. App. 22a.

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[3] Alternatively, the Fifth Circuit held that, except for meals and lodging expenses, the contributions at issue were deductible as unreimbursed expenditures under Regulation (g), regardless of any control exercised by the Church. 782 F.2d at 1331. See *infra* note 18.

The court of appeals affirmed the grant of summary judgment, essentially adopting the reasoning of the district court. Like the district court, the court of appeals held that a contribution made for the purpose of paying the costs of missionary service by another is "for the use of" the Church only if the Church "possesses the funds." Pet. App. 9a. It rejected the more limited control test articulated and applied by the Fifth Circuit in *Brinley*. And like the district court, the court of appeals held that Regulation (g) applies only to unreimbursed expenses incurred in connection with the taxpayer's own service to a charitable organization. Pet. App. 13a. It thereby rejected the alternative approach articulated and applied by the Tenth Circuit in *White*. Summarizing these two holdings, the court concluded that "[t]he statutory system . . . does not provide for a deduction by a taxpayer who does not actually render service to the charity or make a contribution *directly to* the charity." (Pet. App. 15a. (Emphasis added.)

SUMMARY OF ARGUMENT

The issue in this case is whether the modest contributions petitioners sent to their sons to support the Church's missionary program are contributions "to or for the use of" the Church within the meaning of Section 170. Petitioners maintain that contributions sent directly to the Church's missionaries are deductible (1) as contributions "for the use of" the Church, as the Fifth Circuit held in *Brinley*; (2) as unreimbursed expenditures under Regulation (g) (and therefore contributions "to" the Church), as the Tenth Circuit held in *White*; or (3) as contributions "to" the Church by virtue of their having been made to the two missionaries who were acting as agents of the Church, duly authorized to accept such contributions on behalf of the Church.

1. The court of appeals erred in holding that petitioners' contributions were not "for the use of" the Church.

The court of appeals' requirement that the Church must obtain possession of the donated funds (Pet. App. 9a) is patently incorrect because it renders the phrase "for the use of" superfluous. The plain language of the statute permits a deduction for contributions made not only "to" but also "for the use of" a qualified charity, and obviously contemplates that contributions in the second category will be placed in the possession of a third party. The legislative history reveals that, by adding the words "or for the use of" to the pre-existing charitable contribution statute (which permitted deductions only for contributions made "to" a qualified charity), Congress intended just that result. The court of appeals' possession requirement is also flatly inconsistent with not only the overall structure of Section 170, but also the holdings of every other lower federal court that has addressed the question.

As the Fifth Circuit correctly held in *Brinley*, the amount of control required for a contribution to be "for the use of" a qualified charity is decidedly less than full possession. One interpretation based on the common law meaning of the phrase "for the use of" is that funds given to someone who owes a fiduciary duty to a charitable organization with respect to that money constitutes a contribution "for the use of" the charity within the meaning of Section 170. Alternatively, "for the use of" can be read to imply a requirement that the charity have sufficient control to ensure, as a practical matter, that the contribution will serve primarily the charity's own purposes rather than primarily benefit the donor or some other party. As *Brinley* indicates, this latter test is satisfied if the charity exercises substantial control over the contributions themselves as well as the uses to which the contributions are put. Unlike the court of appeals' extreme possession test, both of these alternative tests are consistent with the language, legislative history and structure of Section 170. They are also fully consistent

with the overall objective of Section 170, which is to provide a deduction for contributions that serve a genuine charitable purpose.

The contributions at issue here easily satisfy both tests. The missionaries clearly received the money solely for the purpose of furthering the Church's missionary goals and not for their personal use, thereby establishing that they received that money in a fiduciary capacity for the use and benefit of the Church. In addition, the Church exercised extraordinary control over petitioners' payments to ensure that those payments would benefit primarily the Church: Petitioners' payments were made at the request of, under the direction of and in amounts specified by the Church. The Church closely monitored the missionaries' expenditures through weekly reports. The Church also closely supervised the missionaries' day-to-day activities, further ensuring that petitioners' contributions would be used only to serve the Church's purposes. Petitioners' contributions, moreover, clearly provided a substantial benefit to the Church because they paid for proselytizing expenses that the Church otherwise would have incurred.

2. Even if the Church lacked the requisite degree of control required for a contribution "for the use of" the Church, petitioners' payments nevertheless were deductible as unreimbursed expenditures within the meaning of Regulation (g). Under the plain terms of Regulation (g), unreimbursed expenditures incident to services performed for a qualified charity are deductible as long as the expenditures primarily benefit the charity. This requirement is satisfied here. The court of appeals' holding that Regulation (g) applies only to unreimbursed expenditures incurred by the taxpayer in connection with his or her own services to a charity is contrary to the regulation's language as well as the clear weight of authority.

3. Petitioners' contributions are contributions "to" the Church under the plain language of Section 170 because they were made to agents of the Church who were specifically authorized to receive those contributions on behalf of the Church. Missionaries are unquestionably agents of the Church for certain limited purposes, such as teaching the Church's doctrines and beliefs. As demonstrated by the undisputed evidence in this case, missionaries also are agents of the Church for the purpose of accepting contributions, within the limits set by the Church, that are necessary to carry out their missionary labors. Because a charitable contribution made to an agent authorized to accept donations on behalf of the donee is equivalent to a contribution made to the donee itself, the contributions at issue here were "to" the Church within the meaning of Section 170, and therefore are deductible.

4. Finally, the rule applied by the court of appeals is both arbitrary and contrary to the Nation's long-standing tradition of religious accommodation. Under the court of appeals' reasoning, the contributions at issue here unquestionably would have been deductible if petitioners had sent them to the Church for transmittal to the missionaries, or if they had been made from the missionaries' own funds. There is no rational reason to deny a deduction merely because petitioners, at the request and under the direction of the Church, contributed their own funds directly to the missionaries. None of the administrative considerations that appear to have influenced the court of appeals—income shifting, deduction shifting, or double deductions—has any merit whatever in the context of the Church's missionary program. The only practical effect of the court of appeals' decision is to place enormous pressure on the Church to abandon its long-standing tradition of direct contributions, a tradition that has substantial religious and practical value to the Church and its members. Inasmuch as there is

no evidence, much less clear evidence, that Congress intended this result, the Court should hold that Section 170 authorizes petitioners' deductions.

ARGUMENT

It is well settled that tax provisions dealing with charitable contributions should be broadly construed to effectuate their purpose of encouraging charitable activity. *E.g.*, *Helvering* v. *Bliss*, 293 U.S. 144, 151 (1934); *Old Colony Trust Co.* v. *Commissioner*, 301 U.S. 379, 384 (1937). Chief among those provisions is Section 170, which specifies the circumstances in which a deduction for charitable contributions will be allowed. Its earliest predecessor, enacted in 1917, permitted taxpayers to deduct charitable contributions only when those contributions were made directly "to" religious, charitable, educational and similar eleemosynary organizations. See 2 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 35.1.1 (1981). In 1921, however, Congress broadened the scope of the provision to permit deductions for contributions made "for the use of" such organizations. Revenue Act of 1921, ch. 136 § 214(a)(11), 42 Stat. 227, 241 (1921).

In its present form, Section 170 permits a deduction of any "gift or contribution" that is "to or for the use of" an organization identified in Section 501(c)(3) as eligible to receive charitable contributions. See, *e.g.*, 2 B. Bittker, *supra*, ¶¶ 35.1.1, 35.1.2. The government does not dispute that the Church is an eligible 501(c)(3) organization. Nor does it dispute that petitioners' payments to their missionary sons constitute a "gift" or "contribution" within the meaning of Section 170. See Brief For The United States 6 (No. 89-98 filed October 13, 1989); cf. *Hernandez* v. *Commissioner*, 109 S. Ct. 2136 (1989). This case therefore presents a single, narrow issue of statutory construction: whether petitioners' payments were "to or for the use of" the Church within the meaning of Section 170.

Petitioners' payments are deductible under any of three alternative rationales: First, payments made to the Church's missionaries are gifts or contributions "for the use of" the Church within the meaning of the statute. Second, those payments are deductible as contributions "to" the Church because, under Regulation (g), they constitute unreimbursed expenditures incurred in connection with service rendered to the Church. Third, those payments are deductible as contributions "to" the Church because missionaries are limited agents of the Church and are authorized to accept such contributions on behalf of the Church. The conclusion that these payments are deductible under Section 170 or Regulation (g) is compelled by the plain language of those provisions, especially given this Court's admonition that such provisions should be broadly construed in favor of the taxpayer.

I. PETITIONERS' CONTRIBUTIONS ARE DEDUCTIBLE UNDER SECTION 170 AS CONTRIBUTIONS "FOR THE USE OF" THE CHURCH.

The court of appeals held that a gift or contribution is "for the use of" a charitable organization only if the organization has a level of control amounting to possession of the funds. See *supra* 10; Pet. App. 9a, 15a, 24a. Thus, in the court of appeals' view, missionary contributions are deductible only if paid first to the Church and then disbursed by the Church to the missionaries. The court concluded that, because the payments at issue here were made directly to petitioners' sons and were never in the actual possession of the Church, those payments were not "for the use of" the Church. Pet. App. 15a.

The court of appeals' control standard, however, is contrary to the language, legislative history and structure of Section 170, as well as the clear weight of authority in the lower federal courts. A close analysis of the statutory language reveals that if control is re-

quired at all, the proper test is whether the charity has sufficient control to ensure that the contribution primarily benefits the charity. Because the contributions at issue here unquestionably satisfy this control requirement, those contributions were "for the use of" the Church within the meaning of Section 170.

A. The Ninth Circuit's Possession Test Of Control Is Plainly Incorrect.

1. The Ninth Circuit's requirement that the Church must physically possess a contribution for it to be deductible is a patently erroneous reading of the statute's plain language for two reasons.

First, it reduces the "for the use of" language to a mere redundancy. To require that a charity have physical possession of a gift or contribution is to require that the gift or contribution be made to the charity. The court of appeals candidly acknowledged as much when it stated that the deduction is not available to a taxpayer who does not render services to the charity *unless* the contribution is made "directly to" the charity. Pet. App. 15a. On its face, however, Section 170 provides for the deductibility of two distinct types of contributions: contributions to a qualified institution and contributions for the use of such an institution. The latter category, which was specifically added to the statute in 1921 (*infra* 20-21), necessarily assumes that the contribution is made "to" someone *other* than the charity.

By collapsing these two distinct categories of contributions, the court of appeals' interpretation violates the fundamental principle that statutes should be read to give effect to every word and phrase. See, *e.g.*, *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955); 2A *Sutherland Stat. Const.* § 46.06

at 104 (4th ed. 1984). See also *Deubel* v. *Kervick*, 33 N.J. 568, 166 A.2d 561, 564 (N.J. 1960) (holding that statute exempting devises "to or for the use of" charitable institutions contemplates two distinct categories of contributions). That principle is particularly apt where, as here, the phrase at issue was specifically *added* to a preexisting statute. In short, the court of appeals' decision would effectively repeal the very words that Congress added to the statute in 1921.

Second, the court of appeals' interpretation disregards the established meaning of the phrase "for the use of." Today, as well as in 1921, that phrase describes the entire array of fiduciary relationships in which one person conveys money or property to someone else to hold or employ in some manner for the benefit of a third person.

Such relationships abound in the law. In addition to the obvious example of a trust—in which a settlor conveys property in trust to a trustee (the fiduciary) "for the use of" a beneficiary—such a relationship can arise from a third party beneficiary contract, as when A enters into a contract with B whereby B serves as personal valet to C, or installs the electrical system in C's building, or discharges a debt owed by C.[3] Such a relation-

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[3] *E.g.*, *Thomason* v. *Commissioner*, 2 T.C. 441, 444 (1943) (payment made to third party to discharge debt owed by charity would be contribution "for the use of" charity); *Board of Educ.* v. *Fred L. Ockerlund, Jr. & Associates, Inc.*, 165 Ill. App. 3d 439, 519 N.E.2d 95, 97 (Ill. App. Ct. 1988) (direct third party beneficiary contract "for the use of" such beneficiary); *Resnik* v. *Curtis and Davis, Architects & Planners, Inc.*, 58 Ill. App. 3d 28, 373 N.E.2d 772, 775 (Ill. App. Ct. 1978), *aff'd & remanded*, 400 N.E.2d 918 (1980) (Department of Public Safety of Illinois had enforceable rights as third party beneficiary under contract "for the use of" that department); *Calamari* v. *Grace*, 98 A.2d 74; 469 N.Y.S.2d 942, 946 (N.Y. App. Div. 1983) (title abstract prepared "for the use and benefit of third parties" entitles such parties to sue abstracter for negligence); *Beckovsky* v. *Burton Abstract & Title Co.*, 208 Mich. 224, 175 N.W. 235, 238 (1919) (same); *Corbin*

ship can also arise from an executorship, as when the executor of an estate (yet another kind of fiduciary) holds the decedent's property "for the use of" the decedent's heirs.[4] It can also arise from a conservatorship, guardianship or receivership, as when a conservator receives and manages property "for the use of" a minor ward.[5]

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on Contracts §§ 772-797 (one volume ed. 1952); G. Bogert, *The Law of Trusts and Trustees* § 17 at 215-31 (rev. 2d ed. 1984).

[4] *E.g.*, *Loucks* v. *Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198, (N.Y. 1918) (under New York statute, executor recovering in wrongful death action holds funds "one-half . . . to the use of the widow and one-half to the use of the children of the deceased"); *Hunter* v. *Seery*, 206 A.D. 19, 200 N.Y.S. 531, 533 (N.Y. App. Div. 1923) (under redemption statute, judgment debtor could recover property by paying amount equal to purchase price to purchaser's executor "for the use of" purchaser's estate); *In re Myers' Estate*, 238 Pa. 195, 86 A. 89, 93 (1913) (executor to hold proceeds from life insurance "for the use and benefit" of estate); Bogert § 12 at 128-146.

[5] *E.g.*, *Bradshaw* v. *Mutual Life Ins. Co.*, 205 N.Y. 467, 98 N.E. 851 (1912) (guardian to hold life insurance proceeds "for the[] use of" insured's minor children); *Gasner* v. *Pierce*, 286 Pa. 529, 134 A. 494, 496 (1926) (joint tenant collecting rent does so as receiver "for the[] joint use" of tenants); *Kurtz* v. *Lawrence*, 269 Pa. 22, 112 A. 83, 84 (1920) (receiver entitled to recover "for the use of" assignee); Bogert §§ 13-14 at 146-160.

A fiduciary or "for the use of" relationship can also arise from an equitable charge, as when A conveys a farm to B with the stipulation that B will pay C a certain amount per year from the income of the farm. *E.g.*, *Southern Ohio State Exec. Offices of Church of God* v. *Fairborn Church of God*, No. 88-71 (Ohio Ct. App. March 29, 1989) (LEXIS, States library, Ohio file) (equitable charge created where one church to manage property "for the 'sole and exclusive use and benefit' " of another church); *Victoria Bank and Trust Company* v. *Cooley*, 417 S.W.2d 814, 818 (Tex. Civ. App. 1967) (equitable charge arose under implied covenant to "use the income, profits and royalties from the land, . . . for the use and benefit of the grantors"); Bogert § 31 at 384-85. Such a relationship can also arise from a condition subsequent, as when A conveys land to B on the condition that if B ceases to use the land for C's

Fiduciary or "for the use of" relationships also frequently arise in relatively informal settings. A citizen, for example, may convey property to a government entity "for the use of" the public, in which case the government's fiduciary obligation arises not from the law of trusts or guardianships, but from the government's fiduciary duty to manage public property in the public interest. Bogert, *supra*, § 34 at 406-12 (property donated for "public use"); *Archbold* v. *United States*, 444 F.2d 1120 (Ct. Cl. 1971). Similarly, money or property may be given to a parent "for the use of" his or her children, in which case the parent, although not necessarily acquiring all the responsibilities of a trustee, acquires a fiduciary responsibility to use the funds as specified. *E.g.*, *In re Thurman*, 225 A.D. 889 (N.Y. App. Div. 1929) (testator's widow to receive funds "for the use of" testator's children). Moreover, funds may be given to attorneys, brokers, or public officials (such as a sheriff at a sheriff's sale) "for the use of" a third party, in which case such persons acquire limited fiduciary duties toward those parties. *E.g.*, *Hunter*, *supra*, 200 N.Y.S. at 533 (under redemption statute, payment to assignee or sheriff "for the use of" purchaser allow judgment debtor to recover property): *Black's Law Dictionary* 563-564 (5th ed. 1979) (attorneys, corporate directors and public officials act in fiduciary capacity holding property for others).[6] In short, the phrase "for the use of" refers to any situation in which a fiduciary relationship arises.

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benefit, the land will revert to A. *E.g.*, Bogert § 35 at 412-14; *Heaston* v. *Board of Commissioner*, 20 Ind. 398, 402 (1863) (conveyance "for the use of" another may give rise to condition subsequent, the breach of which causes the property to revert to grantor).

[6] Except when it affects interest in real property, a fiduciary or "for the use of" relationship need not be in writing. See, *e.g.*, Bogert, *supra*, § 1 at 10 (trusts); *Corbin on Contracts*, *supra*, at §§ 18, 301-16 (third party beneficiary contracts); *Victoria Bank & Trust Co.*, *supra*, 417 S.W.2d at 818 (equitable charge). Moreover, a "for the use of" relationship can arise even if the bene-

The common thread in all of these examples is that the money or property conveyed "for the use of" the beneficiary is actually placed in the possession of a third party rather than the beneficiary. The court of appeals' possesion test, therefore, is contrary to the settled principle that whenever a statute borrows a legal term of art or invokes a judicially defined concept, that term or concept should be interpreted in a manner consistent with its established meaning. *E.g.*, *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). Whatever control requirement can be inferred from the words "for the use of," it clearly must be something less than actual possession.

2. The legislative history of Section 170 demonstrates that Congress meant what it said when it permitted deductions for contributions made "for the use of" a charity. The phrase, "or for the use of" was added in 1921. According to the legislative history, the immediate impetus for this modification was a ruling by the Bureau of Internal Revenue that deductions could not be taken for contributions to trusts, community chests, and other charitable foundations unless the organizations receiving the contributions were themselves tax-exempt charitable institutions, even if those contributions were to be used to benefit a qualified institution. O.D. 669, 3 C.B. 187 (1920). The driving force behind the amendment was a desire to permit deductions for contributions made to these organizations *as well as* for contributions made directly to qualified charitable corporations. See H.R. Rep. No. 350, 67th Cong., 1st Sess. 12 (1921) (House Comm. on Ways and Means); Hearings on H.R. 8245 Before

ficiary's rights are not legally enforceable. Some courts, for example, deny an intended third-party beneficiary the power to sue to enforce a contract against the promisor. *E.g.*, Bogert, *supra*, § 17 at 222-23; *Corbin on Contracts* § 772 at 724-25 (minority rule that third parties cannot enforce contracts for their benefit). He must therefore rely instead upon whatever influence he has over the promisor. Similarly, a condition subsequent was one enforceable only through self-help. *E.g.*, Bogert, *supra*, § 35 at 413.

the Senate Comm. on Finance, 87th Cong., 1st Sess. 293-95 (1921).

This history directly repudiates the court of appeals' view that Congress intended to permit a deduction only when a qualified charity obtains actual possession of the funds. If that were so, contributions made to non-qualified trusts, community chests and charitable foundations for the use and benefit of qualified charitable corporations would not be deductible because the trust, community chest or foundation—not the qualified charity—possesses those contributions at the time they are made. Under the Ninth Circuit's interpretation of Section 170, then, Congress failed to solve the very problem that it set out to correct when it added "or for the use of" to the statute.

3. The court of appeals' "actual possession" test is also flatly inconsistent with subsection 170(b) of Section 170 which limits the percentage of a taxpayer's income that qualifies for a charitable deduction. The significant feature of that provision is that it imposes a separate and stricter limit on deductions "for the use of" a charity than on deductions "to" a charity.[7] Obviously, this provision demonstrates, contrary to the holding below, that "to" and "for the use of" describe distinct categories of charitable deductions. Congress, moreover, must have been aware that the degree of control exercised by a charity

[7] Prior to 1954, a taxpayer could deduct up to 20% of adjusted gross income ("AGI") for both contributions "to" and contributions "for the use of" charitable institutions, except in certain circumstances where unlimited deductions were allowed. In 1954, however, Congress amended Section 170(b)(1)(A), to allow *additional* deductions (up to 30% of AGI) for contributions "to" charitable institutions. See, *e.g.*, H.R. No. 1337, 83rd Cong., 2d Sess. A543 (1954), *reprinted in* 1954 U.S. Code Cong. & Admin. News 4025, 4190. Today, Section 170(b) limits deductions "to" a charity to 50 percent of gross income, while limiting deductions "for the use of" a charity to 30 percent of gross income. 26 U.S.C. § 170(b)(1)(A), (B).

is necessarily lessened to some degree when the contribution is made "for the use of" the charity rather than made directly to the charity. See, *e.g.*, *Rockefeller* v. *Commissioner*, 76 T.C. 178, 190-91 (1981) (concluding, based on legislative history, that Congress allowed smaller tax deductions for "for the use of" contributions because charities would not receive funds directly). Congress thus clearly did not intend that the term "for the use of" would be limited to contributions made directly to a charity.

4. Finally, the "actual control" requirement adopted by the courts below is contrary to the clear weight of authority in the lower federal courts. Indeed, to petitioners' knowledge, *every* other federal court to address the issue has reached the conclusion that a gift or contribution made "for the use of" a qualified charity is deductible even if the qualified charity does not have actual possession of the gift or contribution. *E.g.*, *Brinley*, *supra*, 782 F.2d at 1331; *Winn* v. *Commissioner*, 595 F.2d 1060, 1065 (5th Cir. 1979); *Bauer* v. *United States*, 449 F. Supp. 755, 758 (D. La. 1978), *aff'd*, 594 F.2d 44 (5th Cir. 1979); *SICO Foundation* v. *United States*, 295 F.2d 924, 930 (Ct. Cl. 1961); *Archbold* v. *United States*, 444 F.2d 1120, 1122 (Ct. Cl. 1971).[8] In short, the courts

[8] Indeed, the Internal Revenue Service recognized this in its own regulations and decisions prior to the Second Circuit's decision in *Rockefeller* v. *Commissioner*, 676 F.2d 35 (2d Cir. 1982), which held that unreimbursed expenditures are contributions "to" rather than "for the use of" a charity. For several decades prior to that decision, the IRS took the position that unreimbursed expenses directly attributable to the performance of voluntary services for a qualified donee were "for the use of" that donee. *E.g.*, Rev. Rul. 80-45, 1980-1 C.B. 54 (unreimbursed expenditures of VITA volunteers are "for the use of" United States under Section 170(c)(1); see also *Archbold* v. *United States*, 444 F.2d 1120, 1123 (Cl. Ct. 1971) (citing Rev. Rul. 58-279, 1958-1 C.B. 145). In so ruling, the IRS plainly recognized that the beneficiaries of the services rendered never had actual possession of the out-of-pocket expenses incurred by the taxpayer in rendering those services.

below have adopted a wholly unprecedented reading of the statutory provision that is at odds with Congress's intent to expand the deduction beyond contributions "to" a charity.

B. A Contribution Made To A Third Party Is "For The Use Of" A Qualified Charity If The Charity Acquires Sufficient Control Reasonably To Ensure That The Contribution Will Primarily Benefit The Charity, As Evidenced By Substantial Control Over The Circumstances Of The Contribution As Well As The Uses To Which The Contribution Is Put.

Having rejected the Ninth Circuit's interpretation of "for the use of," it is necessary to determine the proper meaning of that phrase. As always, the plain language of the statute is the starting point. *E.g.*, *Hallstrom* v. *Tillamook County*, 58 U.S.L.W. 4007, 4009 (U.S. Nov. 7, 1989); *United States* v. *Ron Pair Enters.*, 109 S. Ct. 1026, 1030 (1989); *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983). Although the phrase "for the use of" need not impose any control requirement beyond that which is implicit in a fiduciary relationship, a plausible textual argument can be made that the phrase requires that the charity have sufficient control over the contribution reasonably to ensure that the contribution will primarily serve the organization's charitable purposes, rather than the purposes of some private or non-exempt individual or entity. Unlike the court of appeals' test, this control test, which is essentially the standard applied by the Fifth Circuit in *Brinley*, comports with the structure, legislative history and purposes of Section 170. The same is true of the less stringent "fiduciary relationship" test suggested by the common-law meaning of "for the use of".

1. As previously noted (*supra* 17-20), the phrase "for the use of" is a term of art denoting any kind of fiduci-

ary relationship in which one party receives money or property for the benefit of another. It is not limited to relationships that satisfy the formal requirements of a trust, executorship, guardianship, or receivership.[9] Rather, the term "fiduciary relationship" is "[a] very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one man trusts in or relies upon another." *Black's Law Dictionary* 564 (5th ed. 1979).

Given the well established meaning of the phrase "for the use of," a strong argument can be made that the phrase imposes no control requirement beyond what is inherent in the notion of a fiduciary relationship. See, *e.g.*, *Morissette* v. *United States*, *supra*, 342 U.S. at 263 (term of art should be given its established meaning). To be sure, a fiduciary's discretion over property held "for the use of" another is subject to various kinds of legal, moral and social constraints. See *supra* 17-20. But a *beneficiary* in a fiduciary relationship may have little or no control over the fiduciary, as in the case of a beneficiary of a blind trust or a minor or incompetent person. See *supra* note 6. Indeed, the phrase "for the use of" is often used interchangeably with "for the benefit of," suggesting that the only requirement is that the contribution be made to a third party fiduciary in a manner that will benefit a charitable organization.[10]

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[9] As the IRS Chief Counsel stated in his brief to the Tax Court in *Rockefeller* v. *Commissioner*, 76 T.C. 178 (1981) (a copy of which has been lodged with this Court), "[m]any payments other than payments to a trust are payments 'for the use of charity.'" Respondents' Brief in Answer, No. 9356-77, at 14 (quoting with approval *Orr* v. *United States*, 343 F.2d 553, 556-57 (5th Cir. 1965)).

[10] See, *e.g.*, *Black's Law Dictionary* 1382 (5th ed. 1979) ("'use' literally means 'benefit'"); *Deubel* v. *Kervick*, 38 N.J. 568, 166 A.2d 561, 564 (1960) ("to the use of" held to be synonymous with "for the benefit of"); 91 C.J.S. § 515 (1977) ("use" synonymous with "benefit"); *Higgins* v. *Downs*, 91 N.Y.S. 937, 101 A.D. 119 (N.Y. App. Div. 1905) ("for my son's benefit" held to mean "to the use of" said son); *Heaston* v. *Board of Commissioners*, 20 Ind. 398, 403 (1863) ("use" synonymous with "benefit"); *McAllister* v. *Long*, 206 Okla. 623, 246 P.2d 352, 354 (1952) (same).

On the other hand, a reasonable textual argument can also be made that the phrase "for the use of" requires a more substantial level of control, at least when applied to charitable contributions. See *Brinley*, 782 F.2d at 1334-36. Specifically, "for the use of" can be read to imply that the donee must have substantial (although not complete) control over the "uses" to which the property is ultimately put, a level of control that would not be required for a contribution merely to confer a benefit upon a charity.[11] It also can be read to imply that the donee will have sufficient control to ensure that the property is used or exercised in a manner consistent with the donee's benefit and enjoyment, as is frequently (though by no means always) true in fiduciary relationships. See *supra* 17-20. And, in the case of a contribution "for the use of" a charity, the word "use" can be read to imply that the contribution is to be put to a "charitable use," that is, used for the organization's charitable purposes. See, *e.g.*, *Black's Law Dictionary* 213 (5th ed. 1979).

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[11] For instance, payments made by a third party to a boys' ranch to house and feed a child under the care of an orphanage might incidentally benefit the orphanage by reducing the expenses the orphanage otherwise would incur in feeding and housing the child in its own facility. Yet those payments would not be "for the use of" the orphanage within the ordinary meaning of that phrase unless the orphanage controlled the payments. See, *e.g.*, *Thomason* v. *Commissioner*, 2 T.C. 441 (1943). See also *Mayo* v. *Commissioner*, 30 T.C.M. (CCH) 505 (1971) (denying deduction of contribution, made without any request from or control by church, to Mennonite missionary to supplement church stipend).

Thus, it could be argued that the level of control that a charitable organization must have for a contribution to be considered "for the use of" that organization is a reasonable ability to ensure that the contribution primarily serves the organization's charitable purposes.

Such control, moreover, can be fairly (and conclusively) presumed when the charity exercises substantial control not only over the circumstances under which the contribution is made ("front-end control"), but also over the uses to which the contribution is put ("back-end control"). It is virtually certain that any charity with such "front-end" as well as "back-end" control over a contribution made to a third party for the benefit of the charity will, as a practical matter, possess sufficient control to ensure that the contribution primarily serves the charity's own purposes. This reasoning thus provides at least one rationale for the Fifth Circuit's holding in *Brinley* that, in the context of the Church's missionary program (in which the Church indisputably exercises substantial back-end control over all aspects of its missionaries' activities), control sufficient to warrant a deduction would be established if the taxpayers could show front-end control, *i.e.*, "that the Church requested them to make specific payments and that they responded to these specific requests," or, in other words, that there was "a 'matching' between request and expenditure." 782 F.2d at 1335-36.[12]

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[12] Contrary to the suggestion in the opinion below (Pet. App. 12a), *Brinley* held that the taxpayers were entitled to deduct the full amount of their missionary payments if they could demonstrate control under this standard. See 782 F.2d at 1335-36. Indeed, the Internal Revenue Service, recognizing that the taxpayers in that case could easily satisfy the evidentiary burden imposed by the Fifth Circuit's decision, withdrew its objections to the deductions at issue there. See *Brinley* v. *Commissioner*, Stipulation to Decision, No. 28349-81 (U.S.T.C. October 30, 1986).

This level of control by the charitable organization is the most that is required by the plain language of Section 170, even without the benefit of this Court's admonition that charitable contribution provisions are to be read favorably to the taxpayer. See *supra* 14. Certainly, no more stringent test could be adopted if that principle of interpretation is to have any meaning in this context.

2. Both tests for deductibility—the fiduciary relationship test and the control test—are also consistent with the legislative history of the "for the use of" provision which, as discussed above (*supra* 20-21), was motivated in part by a desire to permit a deduction for contributions made to a trustee "for the use of" a charity. Unlike the court of appeals' extreme actual possession test, both of the tests described above would plainly permit a deduction for such contributions.[13] Both are also fully consistent with Section 170(b) because they recognize that contributions "for the use of" a charitable organization constitute a category of deductible contributions separate and distinct from contributions "to" a charitable organization. *Supra* 21-22.

Finally, both tests also comport with the principal purpose of Section 170, which is to permit a deduction for contributions serving genuine charitable purposes. As this Court stated in *Bob Jones University* v. *United States*, 461 U.S. 574, 591 (1983), deductions for charitable donations are justified on the ground that they "confer[] a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues." The

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[13] Indeed, a trust relationship requires that the beneficiary of the trust be given sufficient control (though of course not actual possession) over the corpus to ensure that it is used for his benefit or enjoyment. *E.g.*, *Restatement (Second) of Trusts* § 112 comment (a) (1959). Thus, a contribution that satisfies the requirements for a trust necessarily satisfies the control test discussed above.

Ninth Circuit's possession test excludes an entire category of such contributions, namely, those that are not made "directly to" (Pet. App. 15a) a charity. The fiduciary relationship test, by contrast, would permit a deduction whenever a contribution is made to a fiduciary for the benefit of a qualified charity. Similarly, the control test described here would permit a deduction whenever the charity has sufficient control over the contributions to ensure that the contributions primarily serve the charity's purposes, as evidenced by both front-end and back-end control over the contributions. Either test, although obviously not as stringent as the court of appeals' test, would make it virtually impossible to obtain a deduction for a contribution that does not, in fact, primarily benefit the charity.

C. Petitioners' Contributions To Their Missionary Sons Were "For The Use Of" The Church Under Any Reasonable Legal Standard.

Applying the previous analysis to the record in this case, it is clear that petitioners' contributions were "for the use of" the Church under any reasonable reading of that phrase.

First, if that phrase is given its ordinary meaning as a term of art denoting a fiduciary relationship, there is ample evidence from which to conclude that petitioners' sons acted in a fiduciary capacity in receiving petitioners' contributions. The affidavit of petitioner Harold Davis, for example, plainly indicates a fiduciary relationship:

> The money transferred by the plaintiffs to the missionaries for which a charitable contribution deduction is claimed was transferred to the missionaries because they were in fact missionaries (as opposed to being merely plaintiffs' sons), *was subject to a clear understanding and commitment by the sons that the money would be used only in accordance with Church guidelines for necessary mission-related expenditures and was not intended for the sons to use as they might see fit.* If the sons had not been missionaries or if they had not agreed to use the money in accordance with Church instructions, the plaintiffs would not have provided the money to them.

Pet. App. 36a-37a (emphasis added). Particularly when combined with other evidence of the strict obligations of loyalty and fidelity which missionaries assume vis-a-vis the Church (*supra* 3-4; Brief of *Amicus Curiae* 7-8) this uncontradicted evidence compels the conclusion that the missionaries in this case received the petitioners' contributions as fiduciaries for the use and benefit of the Church.[14]

Second, if the phrase "for the use of" is read to impose a control test similar to that applied in *Brinley*, the undisputed evidence demonstrates that the Church exercised substantial control over both the circumstances surrounding the making of the contributions as well as the uses to which those contributions were put.[15] Prior to the appointment of each missionary, petitioners agreed to

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[14] Indeed, although the Court need not reach the question (*supra* 17-20), the evidence establishes that petitioners intended to and did create a trust relationship with themselves as settlors, the Church as beneficiary, and their sons as trustees. See Bogert, *supra*, § 1 at 6 (elements of trust are (i) a beneficiary; (ii) expression of intent by settlor that property be held for benefit of beneficiary; and (iii) a trust *res*). At a minimum, the evidence in the record is sufficient to create a triable issue of fact on this issue. Cf. *Cox* v. *Commissioner*, 297 F.2d 36, 38 (2d Cir. 1961) (bequest to member of monastic order was not "for the use of" the order because no evidence that testatrix intended that recipient receive bequest in fiduciary capacity for benefit of order); *Lamson* v. *United States*, 338 F.2d 376, 378 (Ct. Cl. 1964) (same).

[15] The court of appeals stated that "other than requiring the missionaries to submit weekly reports of their expenses, the Church had no discretion over the disposition of the funds." Pet. App. 9a. As demonstrated above (*supra* 6-8), that statement obviously ignores much relevant evidence demonstrating the Church's control. It also ignores the settled rule that the record on appeal is to be read in the light most favorable to the party against whom summary judgment was entered below. *E.g.*, *Matsushita Elec. Indus. Corp.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

provide the missionary the amount of money requested by the Church as appropriate to each mission. Pet. App. 35a. After each missionary was called, the Church sent a letter specifying the expected level of expenses for each of petitioners' sons, which petitioners understood to be the amount the Church wanted petitioners to send. Pet. App. 36a; J.A. 20. In each case, the Church adjusted the specified amount as circumstances changed. See Pet. App. 37a. After the funds were sent, the Church monitored the use of the funds sent to petitioners' sons through weekly reports submitted by the sons. Pet. App. 44a; J.A. 21. The Church also monitored the day-to-day activities of petitioners' sons through their mission presidents and other mission leaders. Pet. App. 30a, 44a.[16] These facts are sufficient to establish the deductibility of the contributions at issue here because they demonstrate both front-end and back-end control, thereby establishing that the Church exercised sufficient control over those contributions to ensure that they primarily benefitted the Church rather than petitioners or the missionaries.

Because petitioners' contributions plainly satisfy the requirements for contributions made "for the use of" the Church under any reasonable reading of Section 170, this Court should reverse the decision below and allow petitioners to deduct the claimed amounts.

II. PETITIONERS' CONTRIBUTIONS ARE DEDUCTIBLE AS CONTRIBUTIONS "TO" THE CHURCH UNDER REGULATION (g).

An alternative ground for deduction of petitioners' contributions is the one relied upon by the Tenth Circuit in *White*. The court in *White* held that, regardless

[16] The adequacy of the Church's control is further demonstrated by extensive evidence showing that petitioners' contributions—and missionary contributions in general—did primarily benefit the Church rather than petitioners or their sons and, indeed, that petitioners' payment were used to pay costs that otherwise would have been borne by the Church. See *supra* 6-8; Brief of *Amicus Curiae* at 10-11.

of whether payments to the Church's missionaries are properly considered "for the use of" the Church, they are deductible as "unreimbursed expenditures" under 26 C.F.R. § 1.170A-1(g) ("Regulation (g)"), which was promulgated in 1972. Moreover, since 1982, the IRS has treated unreimbursed expenditures as contributions "to" rather than "for the use of" a charitable organization. See Rev. Rul. 84-61, 1984-1 C.B. 39.[17]

Regulation (g) provides that "unreimbursed expenditures made incident to the rendition of services to [a charitable] organization . . . may constitute a deductible contribution." 26 C.F.R. § 1.170A-1(g). Unreimbursed expenditures are considered "incident" to the rendition of services as long as they are both "directly connected" with the rendition of services, and are primarily for the benefit of the charitable organization rather than the spender. *White*, *supra*, at 1271; *Brinley*, *supra*, at 1331-32; *Smith* v. *Commissioner*, 60 T.C. 988 (1973); *Sampson* v. *Commissioner*, 43 T.C.M. (C.C.H.) 1408 (1982), *McCollum* v. *Commissioner*, 34 T.C.M. (C.C.H.) 1817 (1978); *Davenport* v. *Commissioner*, 34 T.C.M. (C.C.H.) 1585 (1975).[18]

[17] The Tenth Circuit found it unnecessary to decide whether unreimbursed expenditures are properly considered as payments made "to" or "for the use of" the charitable organization in question. 725 F.2d at 1270. Early decisions construing the predecessor of Section 170, however, treated unreimbursed expenditures incurred incident to service provided to a charity as donations "to" the charity. *E.g.*, *Wolfe* v. *McCaughn*, 5 F. Supp. 407 (E.D. Pa. 1933) (unreimbursed expenditures of taxpayer who rendered services to YMCA in Europe during WWI deductible under Section 214(a)(11) of Revenue Act of 1918, which allowed deductions only for contributions "to" charitable organizations); *Upham* v. *Commissioner*, 16 B.T.A. 950, 951 (1929) (unreimbursed expenses incurred by a physician in traveling to meetings of the American Institute of Homeopathy "constituted contributions to" that society).

[18] Expenses for meals and lodging are deductible if the person rendering service is "away from home." 26 C.F.R. § 1.170A-1(g), 1.262-1(b)(5). The Fifth Circuit, in considering the "away from

It is undisputed that *all* of the expenditures for which deductions are claimed in this case were "directly connected" with the rendition of services by the missionaries to the Church. Thus, all of these expenditures are deductible under Regulation (g) as long as those expenditures primarily benefitted the Church. Contrary to the Ninth Circuit's position, under the Regulation it is irrelevant whether the person paying the expenses also rendered the services.

A. The Payments At Issue Were Primarily For The Benefit Of The Church.

The Tenth Circuit in *White* had "no difficulty" concluding that payments by parents to their missionary sons "primarily serve[]" the Church rather than the parents or the missionaries themselves. 725 F.2d at 1272. The Fifth Circuit reached a similar conclusion in *Brinley*. 782 F.2d at 1336. As discussed above (*supra* 6-8), the undisputed evidence compels that conclusion here as well, for four reasons.

First, the undisputed evidence shows that missionaries are agents of the Church, charged with preaching the gospel and otherwise furthering the Church's purposes in their mission areas. Pet. App. 29a-31a; see also *infra* 38-39. Contrray to the court of appeals' belief (Pet. App.

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home" language of 26 C.F.R. § 1.170A-1(g), erroneously assumed that missionaries are not away from home because they go to a single mission for more than one year. *Brinley* v. *Commissioner*, *supra*, 782 F.2d at 1333-34. Although missionaries are typically assigned to a single mission for up to 23 months after completion of training, it is Church policy to relocate missionaries every six months on the average. In this case, Benjamin was in no city more than eight months, and Cecil was in no location more than six months. Inasmuch as petitioners' sons did not live in any location for more than a year, their "tax home" remained in Idaho. See, *e.g.*, *Dean* v. *Commissioner*, 54 T.C. 663, 667 (1970); *McGimsey* v. *Commissioner*, 30 T.C.M. (CCH) 521, 524 (1971); Rev. Rul. 71-247, 1971-1 C.B. 54; see also Rev. Rul. 83-82, 1983-1 C.B. 45 (temporary stay less than one year does not shift tax home to new location).

9a), they are neither objects, recipients nor beneficiaries of the Church's charitable work. *Cf. Thomason* v. *Commissioner*, 2 T.C. 441 (1943) (denying deduction for donation to qualified welfare agency for benefit of specific individual); *Tilles* v. *Commissioner*, 38 B.T.A. 545 (1938), *aff'd*, 113 F.2d 907, *cert. denied*, 311 U.S. 703 (1940). Nor are they, in effect, students enrolled in a Church-sponsored training program. *Cf. Tripp* v. *Commissioner*, 337 F.2d 432 (7th Cir. 1964) (denying deduction for payments to college scholarship fund earmarked for particular individual); *Fausner* v. *Commmissioner*, 55 T.C. 620 (1971) (denying deduction for payments to parochial schools attended by taxpayers' children). *Haak* v. *United States*, 451 F. Supp. 1087, 78-1 USTC § 9364 (1978) (same); Rev. Rul. 54-580, 1954-2 C.B. 97. Since missionaries spend virtually all their time furthering the Church's purposes, any contributions that do no more than permit them to carry out their missionary labors primarily benefit the Church rather than the missionaries. That is unquestionably true of the contributions made in this case.

It is undisputed that the amounts requested by the Church for missionaries serving in each mission area are barely adequate to cover a missionary's living and other necessary expenses. That conclusion is borne out by examining the amounts permitted by the Church for different areas of the world. See Brief of *Amicus Curiae*, App. A. It is further borne out by the facts of this case: Cecil Davis, who received an average of little more than $225 per month, had no unexpended funds at the end of his mission (Pet. App. 43a). And Benjamin Davis, who received at most $350 per month during his two-year stay in New York, barely had enough unexpended funds at the end of his two-year mission to purchase a $150 camera (Pet. App. 42a).[19] In this case,

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[19] Petitioners do not claim a deduction for the money Benjamin spent on a camera. The only reason Benjamin had enough money

moreover, petitioners transferred their contributions with the clear understanding that the funds so transferred were to be used only in accordance with Church guidelines for necessary mission-related expenses. Pet. App. 36a-37a. This understanding further assured that the funds contributed by petitioners would be used solely for the benefit of the Church.

Second, the undisputed evidence establishes that the Church itself takes final responsibility for supporting the missionaries it calls, regardless of their ability to pay. Pet. App. 31a, 34a. Thus, the Church itself would have been obligated to support petitioners' sons on their missions if petitioners had not done so. Cf. *Tripp*, *supra* (university scholarship fund). Because their donations paid costs that the Church otherwise would incur, petitioners' donations primarily benefitted the Church rather than their missionary sons.

Third, the undisputed fact that the Church requested the amounts contributed (and deducted) by petitioners tends to show that those contributions primarily benefitted the Church's missionary efforts rather than the individual missionaries. Pet. App. 3a, 35a-36a. There would have been no reason for the Church to request those payments if they primarily benefitted the missionaries.

Fourth, the undisputed fact that *petitioners'* primary motivation was to benefit the Church's missionary effort further tends to show that their contributions primarily benefitted the Church rather than their missionary sons. Petitioner Harold Davis, for example, testified that "[t]he primary motive of the plaintiffs in providing the amounts requested by the Church was a sincere religious desire to . . . support the Church's missionary program."

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to buy a camera was that petitioners had sent him an extra $150 for that purpose, in excess of the support payments requested by the Church. See J.A. 19.

Pet. App. 36a. In short, there can be no serious question that petitioners' payments primarily benefitted the Church rather than petitioners or their sons.

B. The Person Rendering The Service Need Not Pay The Expenses.

The court of appeals held that the payments at issue here are not deductible under Regulation (g) because, in its view, that regulation does not "permit[] a deduction for unreimbursed expenses by anyone other than the taxpayer that actually performs the charitable service." That unprecedented holding is incorrect for several reasons.

First, it is inconsistent with the language of Regulation (g). The regulation provides that "unreimbursed expenditures made incident to the rendition of services to" a charitable organization are deductible. This language is unqualified. Unreimbursed expenditures made by a taxpayer incident to the rendition of services by a third party easily fall within the plain terms of the regulation. The court of appeals, however, essentially read the regulation to permit a deduction for "unreimbursed expenditures made incident to *the taxpayer's* rendition of services to" a charitable organization. But if the drafters of the regulation had intended that limitation, it would have been a simple matter to include it in the regulation's language. As the Tenth Circuit held in *White*, there is "no rational basis" under the plain language of the regulation "for distinguishing the payment of the expenses of a dependent son from the payment of a taxpayer's own expenses to perform the same services." 725 F.2d at 1271.

Second, the court of appeals' reading of Regulation (g) is contrary to numerous other decisions that expressly permit the deduction of expenses incurred in connection with the rendition of services by someone other than the taxpayer. As previously noted, both *White* and *Brinley* held that the expenses incurred by the Church's mission-

aries and paid by their parents could be deducted under Regulation (g). Both decisions, moreover, expressly rejected the government's proposed limitation on the scope of Regulation (g). *Id.*; *Brinley, supra*, 782 F.2d at 1332 ("[W]e find nothing on the face of § 1.170A-1(g) that expressly limits deductions for expenditures incurred in the rendition of charitable work to the person who actually performs the service"). Numerous other decisions have permitted a taxpayer to deduct, under Regulation (g), expenditures incurred by the taxpayer in connection with the rendition of services by someone else. *E.g.*, *Rockefeller* v. *Commissioner*, 676 F.2d 35 (2d Cir. 1982) (deduction by taxpayer for expenses incurred by both employees and non-employees); *McCollum* v. *Commissioner*, 37 T.C.M. (CCH) 1817 (1978) (deduction by taxpayer for expenses incurred in connection with services rendered by children); *Smith* v. *Commissioner*, 60 T.C. 988 (1973) (taxpayer allowed to deduct expenses incurred in purchasing meals of other missionaries).[20] Contrary to the Ninth Circuit's suggestion (Pet. App. 14a), none of those cases turned on whether the services rendered by the third party were rendered "independently" of the taxpayer's own services. To petitioners' knowledge, moreover, no decision other than decisions below has denied a deduction under Regulation (g) on the ground that someone other than the taxpayer was rendering the service at issue.

Third, the meager "legislative history" relied upon by the Ninth Circuit provides no support for its position.

[20] Indeed, it is common—and indisputably proper for a business to take a deduction for expenses incident to the rendition of services by a third party. *E.g.*, *Salt* v. *Commissioner*, 18 T.C. 182 (1952) (deduction allowed for *expenses* incurred by attorneys in representing taxpayers; Trade or Business Expenses (CCH) ¶¶ 1348.4018 (1988). Expenses incurred by attorneys incident to services rendered on behalf of clients are a prime example. There is no rational reason to treat expenses incurred in connection with rendition of charitable services any differently.

Although both of the legislative reports cited by the court (a report by the House Ways and Means Committee on the Tax Reform Act of 1986 and a report of the Joint Committee on Taxation on the Deficit Reduction Act of 1984) do state that unreimbursed expenditures incurred by the taxpayer in rendering services to a charitable organization are deductible, neither of those reports states or implies that Regulation (g) is limited to situations in which the taxpayer is the person rendering the services. See H.R. Rep. 426, 99th Cong., 1st Sess. 119 (1985); *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, 98th Cong., 2d Sess. at 1133 (1984). Neither of those reports, moreover, purports to present a thorough exegesis of the regulation. In any event, the views of Congress in 1984 and 1985 are a hardly reliable authority on the meaning of a regulation adopted in 1972. *Eg.*, *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); *Oscar Mayer Co.* v. *Evans*, 441 U.S. 750, 758 (1979).

Similarly unpersuasive is the Ninth Circuit's assertion that permitting the deductions at issue here would allow an "assignment" to petitioners of a deduction properly claimed by petitioners' sons. Pet. App. 13a-14a. It is petitioners, not their sons, that paid the expenses incurred by the sons in connection with the sons' missionary service. Hence the Ninth Circuit's assertion simply begs the question whether a taxpayer may deduct expenses incurred in connection with the rendition of charitable services by someone other than the taxpayer.

Accordingly, petitioners' contributions were properly deducted as unreimbursed expenditures under Regulation (g). The court of appeals' contrary judgment, based as it was upon an erroneous legal standard, should be reversed.

III. BECAUSE MISSIONARIES ARE AGENTS OF THE CHURCH AND ARE AUTHORIZED TO RECEIVE PAYMENTS TO SUPPORT THEIR OWN MISSIONARY EFFORTS, SUCH PAYMENTS MADE TO THEM CONSTITUTE PAYMENTS "TO" THE CHURCH UNDER SECTION 170.

The plain language of Section 170 affords what is perhaps the most straightforward way to dispose of the issue presented in this case: Missionaries are limited agents of the Church, authorized, among other things, to receive contributions on behalf of the Church from designated individuals to support the missionaries' own efforts. Accordingly, payments such as those made by petitioners to their sons constitute payments "to" the Church within the meaning of Section 170.

1. It cannot be doubted that the Church's missionaries are agents of the Church for certain limited purposes, such as teaching the Church's doctrines and beliefs to those in the missionary's mission area. The essential elements giving rise to an agency relationship are: "[1] the manifestation by the principal that the agent shall act for him, [2] the agent's acceptance of the undertaking and [3] the understanding of the parties that the principal is to be in control of the undertaking." *Restatement (Second) of Agency* § 1 comment b (1958).

Each of those requirements is fully satisfied here. The undisputed evidence demonstrates that missionaries are selected only after interviews with local leaders of the Church to determine whether a missionary is worthy and suitable to serve as a missionary for the Church. Pet. App. 29a. Prospective missionaries are told that they will be expected to follow rigorous guidelines concerning daily schedules, expenditure of funds, proselyting schedules, theological and language training, personal activities, and dress and grooming standards. If the prospective missionary is recommended for missionary service by local leaders, the President of the Church

sends him a letter calling him to serve a mission in a geographic area specifically designated by the Church. Pet. App. 29a-30a. If the missionary accepts the assignment, he formally notifies the Church. See Pet. App. 30a. After accepting the call to serve, missionaries are appointed ministers of the Church. Pet. App. 30a. Obviously, missionaries can also be relieved of their duties and sent home if they fail to comply with the Church's instructions. See Brief of *Amicus Curiae* at 7 n.12.

In this case, then, the first requirement for an agency relationship—manifestation by the principal that the agent shall act on the principal's behalf—is satisfied by the undisputed fact that Benjamin and Cecil Davis were called and ordained as missionaries and Elders of the Church. Pet App. 40a-42a. The second requirement is satisfied by the undisputed fact that they accepted their calling to serve as missionaries for the Church. *Id.* And the third requirement—an understanding that the principal is to be in control of the undertaking—is satisfied by the undisputed fact that both young men were repeatedly instructed by the Church concerning policies with respect to missionary work and both followed these instructions fully. Pet App. 32a-33a.

2. Because the missionaries are agents of the Church, at least for purposes of rendering missionary service, the only real question is whether the agency relationship between the Church and petitioners' sons included authority to accept, on behalf of the Church, funds donated by Church members (including petitioners) or others to support them in their missionary efforts. This question was succinctly answered in a 1978 letter from the First Presidency of the Church to all Bishops, stating that "missionary support funds are considered contributions to the Church . . . and that the missionary functions as an agent of the Church in receiving such money for use in the missionary program." Letter from Spencer W. Kimball, N. Eldon Tanner, & Marion G. Romney to All Stake,

Mission, and District Presidents, Bishops and Branch Presidents in the United States (October 13, 1978) (Brief of *Amicus Curiae* at App. B).

The record in this case demonstrates that petitioners' sons had express authority to receive donations for their support up to the amounts specified by the Church. Both missionaries were informed that the Church had requested that their parents send them a fixed amount per month to cover their mission expenses. See Pet. App. 35a-36a. Each missionary received instructions from his Mission President and his Missionary Handbook as to the manner in which he would spend all support contributions which he received. Pet. App. 3a.[21] Each son also was required to report his mission expenses weekly to his mission president. Pet. App. 3a. The record also indicates that the Church's practice is to authorize missionaries to accept contributions from "those (usually the family) whom the Church has requested to provide financial assistance" to the missionary. Pet. App. 33a. Thus, although the Church could have requested that petitioners (or other donors) send all missionary contributions to Church headquarters for disbursement to the petitioners' sons, the evidence shows that the Church opted instead to authorize the missionaries to receive such funds as the Church's agents, up to the monthly amount specified by the Church.[22]

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[21] The Missionary Handbook states:

> The money you receive for your [the missionary's] support is sacred and should be spent wisely and only for missionary work. Keep expenses at a minimum. . . . Keep a financial record of all expenditures.

Pet. App. 3a, 33a.

[22] In addition to their express authority to receive contributions for their own support, the record establishes that petitioners' sons had implied authority to do so. The Restatement of Agency states that, unless the parties otherwise agree, the "authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it." *Restatement (Second) of Agency* § 35; see also *id.* § 26 (agency relationship can be implied from the conduct of the parties). Obviously, collection of funds necessary to sustain one's missionary efforts is incidental to the authority to conduct missionary activity.

3. It follows that payments made to support the missionary work of petitioners' sons—within the limits set by the Church—are payments "to" the Church within the meaning of Section 170. It is well established that a charitable contribution made to an agent acting on behalf of the donee is equivalent to a contribution made to the donee. *E.g.*, *Dulin* v. *Commissioner*, 70 F.2d 828, 830 (6th Cir. 1934); *Greer* v. *Commissioner*, 70 T.C. 294, 304 (1978), *aff'd*, 634 F.2d 1044 (6th Cir. 1980); *Skripak* v. *Commissioner*, 84 T.C. 285, 318 (1985); see also 2 J. Mertens, *Law of Federal Income Taxation*, § 10.15 (1982). That is particularly true of a charitable organiaztion, which cannot take any action, including the receipt of gifts or contributions, except through its agents. The Internal Revenue Service, moreover, typically gives charitable organizations wide latitude in designating the agents that are authorized to receive contributions on behalf of the organization.

The rule that a donation to an agent is equivalent to a donation to the charity itself is no less applicable when the agent, pursuant to the organization's instructions, keeps the funds and uses them to further the organization's purposes: "The general rule is applicable even though by the terms creating the agency the principal allows the agent to retain the proceeds collected," 2 J. Mertens, *supra*, § 10.15 at ch. 10, p. 43; see also *Restatement (Second) of Agency* § 71-72 (1958) (agent may collect and retain funds for principal); *Wales* v. *Mower*, 44 Colo. 146, 96 P. 971, 972 (1908) (agent allowed to collect and manage money according to principal's desires). As long as the agent is under the charity's control, it would be senseless to require that donations used to fi-

nance the activities of one of a charity's agents be made in the first instance through a different agent. Therefore, the fact that petitioners' sons used the contributions at issue here to finance their own missionary labors on behalf of (and under the control of) the Church in no way deprives those contributions of their status as contributions "to" the Church within the meaning of Section 170.

IV. THE NINTH CIRCUIT'S DECISION CREATES AN ARBITRARY TAXING SCHEME AND UNDERMINES CONGRESS'S GENERAL PURPOSES IN ENACTING SECTION 170.

One possible explanation for the court of appeals' strained interpretations of the language of Section 170 and Regulation (g) is that the court believed those interpretations would make it easier to administer the tax laws in cases involving contributions to the Church's missionary program. See Pet. App. 10a-11a. However, it is unacceptable to allow Congress's intent in enacting a charitable deduction (which must be construed favorably to the taxpayer, *supra* 14) to be undermined simply to promote administrative convenience. It is particularly unacceptable where, as here, the specific concerns articulated by the court of appeals do not withstand analysis, and where the resulting rules are inherently arbitrary and contrary to the spirit of religious accommodation that is one of this Nation's most cherished traditions.

Even if they were relevant, none of the administrative concerns apparently relied upon by the court of appeals remotely supports its decision. Contrary to the court of appeals' suggestion, there is no realistic possibility that "church members" in high tax brackets [w]ould contribute large amounts to their children . . . and claim the amount was contributed to support charitable activity." Pet. App. 10a-11a. Under the rule proposed by petitioners, the parents' charitable contribution deduction would be limited to the amount specified by the Church for their child's mission area, and parents would have the burden of establishing that their contributions were within the Church's guidelines. The Church, moreover, has strong incentives to keep the specified amounts low. See, *supra* 6, 17-20, 23-30, 32-35. Brief of *Amicus Curiae* at 12. Nor is there any merit to the court of appeals' unsupported suggestion that "deductions properly claimed by low tax bracket missionaries would shift to donees in higher tax brackets." A "low tax bracket missionary" supported by his or her parents or by another benefactor cannot "properly" claim *any* deduction for expenses that are paid by someone else, particularly given that direct missionary contributions are not considered income to the missionary. See Rev. Rul. 62-113, 1962-1 C.B. 10. Accordingly, there can be no "shifting" of tax deductions from missionaries to donors. By the same token, the only way an improper 'double deduction" (Pet. App. 11a) can arise is if the missionary improperly claims a deduction for living expenses that are paid (and deducted) by someone else. But requiring that contributions be made through the Church rather than directly to the missionary does nothing to reduce the possibility of that kind of abuse.[23]

The court of appeals' decision not only lacks any administrative justification, it also creates rules that are inherently arbitrary in their treatment of taxpayers. For instance, if petitioners (or other taxpayers) had contributed money for Benjamin and Cecil's support directly to the Church, those contributions would be deductible as

[23] The same is true of the remaining potential abuse that appeared to concern the court of appeals, *viz.*, that parents might claim a missionary as a dependent while also claiming a charitable deduction for missionary contributions. Pet. App. 11a. Obviously, that could happen just as easily (and perhaps more easily) if the parent made missionary contributions directly to the Church rather than to the missionary.

contributions "for the use of" the Church under the court of appeals' reasoning. See Pet. App. 9a. Similarly, if one of petitioners' sons had had sufficient resources, and had financed his own mission (as many Church missionaries do), amounts expended in connection with his missionary service would be deductible as unreimbursed expenditures under the decision below. See Pet. App. 13a. The Ninth Circuit's decision denies a deduction in this case only because (a) the missionary service undertaken by petitioners' sons was financed by someone other than the missionaries themselves, and (b) petitioners sent their contributions directly to the missionaries rather than sending them to the Church for transmittal to the missionaries.

From the standpoint of tax policy, such a rule obviously exalts form over substance. As previously noted (*supra* 27-28), the purpose of the charitable contribution deduction is to encourage support for qualified charitable organizations like the Church. No one disputes that the direct benefit to the Church's missionary effort is the same (1) whether the missionary's labors are financed by the missionary or someone else, and (2) whether outside contributions for the purpose of supporting the missionary's labors are sent to the Church, in the first instance, or directly to the missionary. Similarly, the Church has the same amount of control over the uses to which missionary contributions are put, regardless of whether those contributions come from the missionary himself or from third parties, and regardless of whether those contributions are made directly to the missionary or to the Church. See *supra* 17-20.[24]

[24] If anything, the Church has *less* control over the amounts properly claimed as a deduction by missionaries who support themselves than by third party benefactors. As previously explained, payments made by third party benefactors (including parents) would, under the rule proposed by petitioners, be deductible only up to the amounts specified by the Church for each mission area during a given year. *Supra* 7. Deductions by missionaries who expend their own funds in missionary service would not be subject to that limitation under the Internal Revenue Service's usual application of Regulation (g).

Aside from its unfairness to taxpayers, the only consequence of the court of appeals' decision is to force the Church to choose between its 160-year tradition of direct missionary contributions, on the one hand, and continued tax deductions for those who, in keeping with that tradition, contribute money directly to the Church's missionaries. If the Church bowed to the pressure created by the court of appeals' decision to centralize the collection and distribution of missionary support payments, the court of appeals' rule would produce exactly the same effect on tax revenues as the rule proposed by petitioners: Parents (or others) contributing money to support a missionary child would be allowed to take a deduction only up to the amount specified by the Church for the mission area. But such a choice would disserve the Church and its religious mission: It would unquestionably increase the Church's administrative and financial burdens. Brief of *Amicus Curiae* at 13-14; Pet. App. 3a, 32a. It would largely destroy the tradition of an unpaid, lay missionary force that has been carefully nurtured during the Church's 160-year history. See Brief of *Amicus Curiae* at 5. It would attenuate the financial bonds between a missionary and his or her family, thereby curtailing the beneficial effects of a mission on the missionary's family. *Id.* at 12; Pet. App. 32a. It would make it more difficult for the Church to help its missionaries keep their expenses down. Brief of *Amicus Curiae* at 12-13, Pet. App. 32a. And it could well create visa and tax problems for missionaries serving in some foreign countries. Brief of *Amicus Curiae* at 13.

Under the applicable rules of statutory construction (*supra* 14), the Church cannot properly be put to the Hobson's choice proposed by the court of appeals without a clear expression of congressional intent to inter-

fere with the Church's traditional method of fulfilling its religious purposes. Certainly no such choice is compelled by Section 170 or, indeed, Regulation (g). Both of those provisions plainly *permit* a deduction for the contributions at issue here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1989

HAROLD DAVIS AND ENID DAVIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether amounts paid by petitioners directly to their children to cover their children's living expenses while they served as church missionaries are deductible by petitioners as charitable contributions under Section 170(a) of the Internal Revenue Code (26 U.S.C.).

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Better Business Bureau v. *United States*, 326 U.S. 279 (1945) 32
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Bob Jones University v. *United States*, 461 U.S. 574 (1983) 10, 12, 13, 14

Cases – Continued:

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Bowman v. *Commissioner*, 16 B.T.A. 1157 (1929) 28
Brandl v. *Commissioner*, 513 F.2d 697 (6th Cir. 1975) 42
Brinley v. *Commissioner*, 82 T.C. 932 (1984), rev'd, 782 F.2d 1326 (5th Cir. 1986) 23, 37, 38, 39, 40, 42
Brinley v. *Commissioner*, 782 F.2d 1326 (5th Cir. 1986) 15, 22, 23, 32, 35, 37, 41, 42, 43
Chartwell Communications Group v. *Westbrook*, 637 F.2d 459 (6th Cir. 1980) 25
Commissioner v. *Flowers*, 326 U.S. 465 (1946) 42
Commissioner v. *National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134 (1974) 10, 32
Cook v. *Commissioner*, 37 T.C.M. (CCH) 771 (1978) 20
Danz v. *Commissioner*, 18 T.C. 454 (1952), aff'd, 231 F.2d 673 (9th Cir. 1955), cert. denied, 352 U.S. 828 (1956) 28
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Davis v. *Commissioner*, 55 T.C. 416 (1970) 15, 22
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Dohrmann v. *Commissioner*, 18 B.T.A. 66 (1929) . 12, 31
Helvering v. *Bliss*, 293 U.S. 144 (1934) 32
Hernandez v. *Commissioner*, 109 S. Ct. 2136 (1989) 12, 16
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James v. *United States*, 308 F.2d 204 (9th Cir. 1962) 42
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Kain v. *Gibboney*, 101 U.S. 362 (1879) 13
Landreth Timber Co. v. *Landreth*, 471 U.S. 681 (1985) 24
Magruder v. *Supplee*, 316 U.S. 394 (1942) 42
Mayo v. *Commissioner*, 30 T.C.M. (CCH) 505 (1971) 20

Cases—Continued: Page

McCollum v. *Commissioner*, 37 T.C.M. (CCH) 1817 (1978) 41
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New Colonial Ice Co. v. *Helvering*, 292 U.S. 435 (1934) 10
Orr v. *United States*, 343 F.2d 553 (5th Cir. 1965) . 22, 28, 43
Peace v. *Commissioner*, 43 T.C. 1 (1964) 19, 25
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Rockefeller v. *Commissioner*, 676 F.2d 35 (2d Cir. 1982) 25, 28, 29, 41
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Wilson v. *Commissioner*, 11 T.C.M. (CCH) 159 (1952) 39

Cases—Continued: Page

Winn v. *Commissioner*, 595 F.2d 1060 (5th Cir. 1979) 18
Winters v. *Commissioner*, 468 F.2d 778 (2d Cir. 1972) 31
Wolfe v. *McCaughn*, 5 F. Supp. 407 (E.D. Pa. 1933) 38

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Internal Revenue Code of 1954 (26 U.S.C.):
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Tax Reform Act of 1986, Pub. L. No. 99-514, § 142(d), 100 Stat. 2120 40
War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 330 11
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Treas. Reg.:
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Miscellaneous:

Blasi & Denesha, *Avoiding Disallowance of Earmarked Charitable Contributions*, 9 Rev. of Tax'n of Individuals 160 (1985) 23

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G. Bogert, *The Law of Trusts and Trustees* (1977) . 14

55 Cong. Rec. 6728 (1917) 13

61 Cong. Rec. 5294 (1921) 11, 13, 27

Hearings on H.R. 8245 Before the Senate Comm. on Finance, 67th Cong., 1st Sess. (1921) 26, 27

B. Hopkins, *The Law of Tax-Exempt Organizations* (5th ed. 1987) 14, 15

H.R. Rep. No. 350, 67th Cong., 1st Sess. (1921) .. 27

H.R. Rep. No. 1860, 75th Cong., 3d Sess. (1938) .. 13

H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954). 13, 28-29

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H.R. Rep. No. 413, 91st Cong., 1st Sess. Pt. 1 (1969) 13

H.R. Rep. No. 426, 99th Cong., 1st Sess. (1985) .. 40

IRS Publication No. 78, *Cumulative List of Organizations* (1989) 11

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I.T. 3707, 1945 C.B. 114 28

McNulty, *Public Policy and Private Charity: A Tax Policy Perspective,* 3 Va. Tax Rev. 229 (1984) ... 16

Note, *A Tax Deduction for Direct Charitable Transfers: The Case Against* Davis *v.* United States, 64 Wash. L. Rev. 935 (1989) 23

Note, *Charitable Deductions for Missionary Support: Conflict Between* White *and* Brinley, 5 Va. Tax. Rev. 203 (1985) 23, 42

Note, *Does Charity Begin at Home? The Tax Status of a Payment to an Individual as a Charitable Deduction,* 83 Mich. L. Rev. 1428 (1985) .. 16, 23, 41, 43

Note, *Earmarked Charitable Contributions: In Search of a Standard,* 50 Mo. L. Rev. 918 (1983). 23

Miscellaneous – Continued: Page

Note, White *v.* United States: *Tenth Circuit Allows Parents "Charitable Contribution" Deduction for Support Payments Made Directly to Mormon Missionary Son,* 62 Den. U. L. Rev. 331 (1984) . 23

O.D. 669, 3 C.B. 187 (1920) 11, 25

O.D. 712, 3 C.B. 188 (1920) 38

Rev. Rul. 55-275, 1955-1 C.B. 295 28

Rev. Rul. 55-4, 1955-1 C.B. 291 40

Rev. Rul. 56-508, 1956-2 C.B. 126 40

Rev. Rul. 58-240, 1958-1 C.B. 141 40

Rev. Rul. 62-113, 1962-2 C.B. 10 ..... 17, 19, 36

Rev. Rul. 68-484, 1968-2 C.B. 105 18

Rev. Rul. 79-81, 1979-1 C.B. 107 18

Restatement (Second) on Trusts (1959) 14

4 A. Scott, *The Law of Trusts* (1967) 14

J. Seidman, *Legislative History of Federal Income Tax Laws (1938-1861)* (1938) 11

Shaller, *Tax Exemption of Charitable Organizations and the Deductibility of Charitable Donations: Dangerous New Tests,* 8 U. Bridgeport L. Rev. 77 (1987) 15, 23

S. Rep. No. 275, 67th Cong., 1st Sess. (1921) 27

S. Rep. No. 552, 91st Cong., 1st Sess. (1969) 15

S. Rep. No. 830, 88th Cong., 2d Sess. (1964) 29

S. Rep. No. 1622, 83d Cong., 2d Sess. (1954) 13, 29

Sol. Op. 159, III-1 C.B. 480, 482 (1924) 14

Staff of the Joint Comm. on Taxation, 98th Cong., 2d Sess., *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984* (Joint Comm. Print 1984) 40

Miscellaneous – Continued: Page

Staff of the Joint Comm. on Taxation, 99th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1986* (Joint Comm. Print 1987) 40

Webster's Third New International Dictionary (1986) 25

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a), as amended, is reported at 861 F.2d 558. The opinion of the district court (Pet. App. 16a-25a) is reported at 664 F. Supp. 468.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1988. A petition for rehearing was denied on April 20, 1989 (Pet. App. 27a). The petition for a writ of certiorari was filed on July 19, 1989, and the petition was granted on November 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

26 U.S.C. 170, and 26 C.F.R. 1.170A-1(g), are set out in pertinent part in an appendix to this brief.

STATEMENT

1. Petitioners and their sons, Benjamin and Cecil, are members of the Church of Jesus Christ of Latter-Day Saints (the Church) (Pet. App. 38a-39a). The Church is recognized by the IRS as an organization formed and operated for religious and charitable purposes within the meaning of Section 170 of the Internal Revenue Code of 1954 (26 U.S.C.) (Pet. App. 5a),[1] which means that contributions "to or for the use of" the Church are tax deductible (see I.R.C. § 170(a) & (c)). The Church operates a worldwide missionary program, in which approximately 25,000 missionaries have participated annually since 1977 (Pet. App. 2a).

In 1979, Benjamin Davis, who was then 18 years old, applied to become a missionary. Benjamin was accepted for two years of voluntary service, and Church officials notified him that he would be assigned to the New York City Mission. The Church later provided Benjamin with information relating to the New York City Mission and advised him of the estimated amount of money that would be required to cover his living expenses while in New York; it appears that the estimate provided by the Church was a range, rather than a specific amount (see J.A. 20). After a month's training at the Church's Missionary Training Center in Provo, Utah, Benjamin moved to New York, where he served as a missionary from November 1979 until December 1981. Pet. App. 3a, 17a, 40a-41a.

Cecil Davis also applied to become a missionary after he turned 18 years old in 1980. He was accepted for missionary service and assigned to the Church's New Zealand-Cook Island Mission. As in Benjamin's case, the Church provided Cecil with information about his mission and an estimate of the amount he would need for his expenses. In August 1981, after training at the Missionary Training Center, he reported to the New Zealand-Cook Island Mission. Pet. App. 3a, 17a-18a, 42a-43a.

[1] Unless otherwise noted, statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

During 1980 and 1981, while Benjamin was serving as a missionary in New York, petitioners transferred $3,481 and $4,135, respectively, to his personal checking account, on which he was the sole authorized signatory. Benjamin used the funds primarily to pay for his living expenses, such as rent, food, and transportation. A small portion of these funds was used to purchase religious materials utilized in his missionary work. During 1981, while Cecil was serving as a missionary, petitioners transferred $1,518 to his personal checking account, on which he was the sole authorized signatory. Cecil used these funds to pay for his living expenses and personal needs, and spent nothing for religious materials. Pet. App. 3a-4a, 17a-18a, 41a-42a.

Benjamin and Cecil were not required to seek Church approval of expenditures made from their personal checking accounts, and, in fact, they did not do so. Each week they submitted a report to their Mission President and Zone Leader describing the amount of time spent in Church service, the type of missionary work accomplished, and other matters of concern. The report also contained a statement of the total expenses for the week, but the expenses were not itemized. They were not required to turn over to the Church funds that were unexpended at the conclusion of the mission. Cecil had no such remaining funds; Benjamin purchased a camera with his funds shortly before he terminated his mission. At no time during their missions did Benjamin or Cecil accept contributions from third parties to be turned over to the Church. Pet. App. 4a, 9a, 17a-18a, 24a, 42a-43a; J.A. 21.

2. Petitioners timely filed joint income tax returns for 1980 and 1981, claiming Benjamin and Cecil as dependents. On these returns, they did not claim any charitable contribution deduction for the support payments made to their sons during those years. In 1984, petitioners filed amended income tax returns, claiming charitable contribution deductions of $3,481 and $4,882 for the amounts transferred to their sons while they served as missionaries. The Internal Revenue Service (IRS) disallowed the refund claims based on these claimed deductions, and petitioners then instituted this refund suit in the United

States District Court for the District of Idaho. Subsequently, petitioners filed a second set of amended returns in 1986. On these returns, petitioners did not claim Benjamin as a dependent. Petitioners also altered the amount of their charitable deductions to correspond to the estimate of living expenses that had been projected by the Church in the letters sent to their sons concerning their missions, slightly reducing the claimed deduction for 1980 and increasing the claimed deduction for 1981 to reflect amounts paid to both Cecil and Benjamin. See Pet. App. 18a, 45a.[2]

The district court granted summary judgment for the government (Pet. App. 16a-25a). The court held that the transfers made by the parents to their sons were not "to or for the use of" a qualified charity within the meaning of Section 170(a) of the Code, and hence were not deductible by petitioners (Pet. App. 23a-24a). Citing several decisions by the Tax Court and the courts of appeals, the court stated that, when a taxpayer asserts that a payment he makes to another individual should be deductible on the theory that it is "for the use of" of a charitable organization, he must show that the charity "control[s]" the contribution—*i.e.*, that "the charity has sufficient possession of the contribution so that it has discretion as to the use to which the donated funds will be put" (*id.* at 24a). The court concluded

[2] The effect of the change for 1980 was to reduce the claimed deduction by $255, from $3,481 to $3,126. For 1981, the effect was to increase the total claimed deduction from $4,882 to $5,653. (It appears that petitioners failed to include support payments made to Cecil in the deduction claimed on their first amended return for 1981.) Petitioners contended that they were entitled both to claim an exemption for Cecil as a dependent for 1981 and to take a charitable contribution deduction for support payments made to him during his missionary service in that year. The rationale given for this treatment was that petitioners had paid more for Cecil's support during the first part of 1981, during which he was a student at Brigham Young University, than they had paid for his support during his missionary service in the latter part of that year; accordingly, petitioners maintained, even if the support payments for which deductions were claimed were excluded, petitioners had still paid more than half of Cecil's support for the taxable year and were entitled to claim him as a dependent. See Exhibits E and F to the United States' Statement of Material Fact; see also J.A. 15-16.

that, in this case, control of the funds clearly lay with petitioners' sons, not with the Church, because "[t]he particular use to which the funds were put was solely within the power of the missionary" (*ibid.*). The court added (*ibid.*):

> It appears from the record before the court that the only role the church played in the distribution of the funds to the missionaries was to provide a projected budget range that would be needed for the particular area in which the missionary would be serving. Beyond that information provided by the church, there is no indication that the church was involved in any way in controlling how the missionary's money was spent.

The district court also ruled that petitioners' transfers were not deductible under Treas. Reg. § 1.170A-1(g) as "unreimbursed expenditures made incident to the rendition of services to" a qualified organization because such unreimbursed expenses may be deducted only by the individual who actually performs the service (Pet. App. 21a-23a).

3. The court of appeals affirmed (Pet. App. 1a-15a). The court explained that "the basic requirement that the beneficiary of a charitable contribution must be indefinite" underlies the system permitting deductions for charitable contributions (*id.* at 9a). Accordingly, the court noted, "where a taxpayer has claimed a charitable deduction for funds that have been earmarked for a specific individual, courts have considered whether the charity exercises control over the use of the funds" (*id.* at 7a). The court stated that, so long as the qualified charity retains control over the funds, the indefiniteness requirement can be satisfied, even when the taxpayer intends a contribution to be used for a specific purpose (*id.* at 9a). "But when a taxpayer makes a contribution directly to the intended beneficiary so that the charity never possesses the funds, let alone controls their use, there can be no guarantee that the beneficiary will be indefinite" (*ibid.*). The court of appeals then concluded that the Church lacked sufficient control over the funds deposited directly into the checking accounts of petitioners' sons to warrant allowing petitioners to deduct the payments as con-

tributions to the Church. The court found that, "[w]hile the Church admonished the missionaries to spend their money wisely, the particular use to which the funds were put was solely within the control of the missionaries[;] • • • other than requiring the missionaries to submit weekly reports of their expenses, the Church had no discretion over the disposition of the funds." *Ibid.*

The court of appeals also held that petitioners could not deduct the funds transferred to their sons as "unreimbursed expenditures" incurred incident to the rendition of charitable services under Treas. Reg. § 1.170A-1(g). Noting that a contrary rule would create major administrative problems and provide the opportunity for improper shifting of deductions among taxpayers, the court of appeals agreed with the district court that the regulation permits the deduction of unreimbursed expenses only by the person actually rendering the services to the charitable organization. Pet. App. 10a-14a.

SUMMARY OF ARGUMENT

A. Under Section 170 of the Code, a contribution is tax-deductible only if it is made "to or for the use of" a qualified organization. This limitation is grounded in the basic rationale underlying the charitable contribution deduction—the belief that such contributions serve the public good. An essential element of the kind of "public charity" that Congress determined to encourage is the concept of "indefiniteness" of beneficiaries. Thus, a donation to a needy individual, though motivated by altruism, is not deductible under the Code. The system established by Congress for effectuating this distinction between "public" and "private" charity depends upon the recognition of qualified organizations, which the IRS can monitor for continued compliance with the congressional standards, coupled with allowing a deduction only for contributions made "to or for the use of" those organizations.

When a payment is merely channeled through a charity, in that the charity's receipt is conditioned upon distribution of the funds to a particular individual, the payment clearly does not

advance the public good in the manner contemplated by Congress. Accordingly, the general rule has emerged that payments made to a qualified charity, but earmarked for the benefit of an individual, will be deductible only if the charity can exercise discretion over the disposition of the funds. The same analysis has been applied to the converse situation presented here—where a payment is made directly to an individual, but the taxpayer argues that the payment should be regarded as "to or for the use of" a qualified organization because of some affiliation between the individual and the organization. If the organization cannot exercise discretion over the funds, the payment does not satisfy the limitations of Section 170.

Petitioners' payments clearly do not satisfy the statutory prerequisites for deductibility. They were not dedicated to the public welfare, but were made to fund the personal expenses of petitioners' own children. And, as both courts below found, it was petitioners' children who controlled the disposition of the funds; the Church exercised no discretion over how the funds were spent.

B. The text, legislative history, and judicial and administrative constructions of Section 170 all demonstrate the error of petitioners' expansive reading of the phrase "for the use of" to cover all payments made to individuals that will confer some benefit upon a qualifying organization. The language of the statute contemplates that the organization will be able to "make use" of the funds, which entails having control over their disposition. The legislative history shows that the phrase was added in 1921 for the limited purpose of overturning a narrow administrative construction of the prior statute—namely, that a donation to a trust that invested the funds before disbursing them to charitable organizations was not a contribution "to" a qualifying organization. Thus, the IRS and the courts generally have viewed the added language as intended to convey a meaning similar to "in trust for," to permit the current deduction of payments to trusts or similar fiduciaries who receive payments from the donor for eventual distribution to qualifying charities.

The 1921 amendment was designed to build on the original scheme requiring transfer "to" a qualifying organization by slightly broadening the statute to cover closely analogous transactions. It was not intended to effect a major overhaul of that system by authorizing deductions for all payments to individuals that might incidentally benefit qualifying organizations. The broad interpretation advanced by petitioners, however, would extend the reach of Section 170 to many kinds of private payments that heretofore have never been thought to be deductible; its practical effect would be substantially to dismantle the qualified donee requirement that has been at the heart of the statutory scheme since its inception.

Petitioners' claimed deduction cannot be sustained on the theory that the Church exercised control of the support payments made to petitioners' sons. The letter sent by the Church to the sons estimating the amount of reasonable expenses may have advanced the Church's goal of ensuring that its missionaries live frugally, but it gave the Church no discretion over the disposition of the funds transferred from parent to child. And the fact that the sons reported to a Church official the total amount of their expenditures after the money was spent similarly gave the Church no discretion over the disposition of the funds.

C. Petitioners may not deduct the support payments as "unreimbursed expenditures" under Treas. Reg. § 1.170A-1(g). That regulation sets forth the general rule that a contribution of services is not deductible, but relaxes that prohibition to allow the deduction of certain unreimbursed expenses incurred in connection with providing those services. The text and structure of the regulation leave no doubt that it is intended to permit a deduction only by the taxpayer affected by the general prohibition on deducting contributions of services, *i.e.*, the taxpayer who both incurs the expense and performs the service. Moreover, if the rule were otherwise, it would open the door to manipulation by taxpayers who could shift and anticipate deductions—giving the deduction to higher-income taxpayers who can obtain a greater tax advantage from the deduction instead of the lower-income taxpayers who actually incur the expenses, and allowing the parent to make (and deduct) support payments in a tax year preceding the actual expenditure of the funds. Such consequences would be far removed from the limited purpose and effect of the regulation.

ARGUMENT

THE PAYMENTS MADE BY PETITIONERS TO THEIR SONS TO COVER THE SONS' LIVING EXPENSES WHILE THEY SERVED AS MISSIONARIES ARE NOT DEDUCTIBLE AS CHARITABLE CONTRIBUTIONS UNDER SECTION 170 OF THE INTERNAL REVENUE CODE

Petitioners directly supplied their sons with funds with which to pay the sons' living expenses while they served as missionaries on behalf of their church. Petitioners contend that these payments are tax-deductible as payments "to or for the use of" the Church within the meaning of Section 170 of the Code because the payments "primarily benefit" or "serve the * * * purposes" of the Church (see Pet. Br. 23). This contention, however, is not faithful to Congress's intent and the limitations that it has deliberately imposed on the deductibility of charitable contributions. Congress has provided that organizations meeting certain criteria should be eligible for tax-deductible donations because they contribute to the public welfare, and it has restricted tax deductions to gifts made "to or for the use of" these qualified donees. By monitoring the activities of these organizations to determine whether they continue to meet the relevant requirements and by enforcing the "qualified donee" restriction, the IRS can administer the law to effectuate Congress's intent.

Petitioners' contention would seriously undermine the effectiveness of the statutory restrictions by permitting taxpayers to avoid this linchpin of the congressional scheme—namely, that deductible contributions be transferred to the control of organizations that the government has determined serve the

charitable public purposes contemplated by Congress. Not only would that deviation from the statutorily prescribed system create enormous complications for the IRS in enforcing the Code, it also would permit taxpayers to obtain deductions for gifts that Congress did not intend to make deductible, such as benevolently motivated gifts to individuals. The result in this case would be that petitioners are entitled to a tax deduction (in some sense, a public subsidy (see *Bob Jones University* v. *United States*, 461 U.S. 574, 591 (1983)) for quintessentially personal expenses—payments made to provide food and shelter to their children. And, more generally, acceptance of petitioners' contention could open the door to the deduction of many other kinds of payments that are routinely made for personal reasons.

A. Petitioners' Payments To Support Their Children Were Not "To Or For The Use Of" The Church Within The Meaning Of Section 170 Of The Code

1. *The Basic System Established By Congress Ensures That Deductible Contributions Will Advance The Public Good By Requiring That Such Contributions Be Transferred To The Effective Control Of A Qualified Charitable Organization*

Like the other deductions from gross income permitted by the Internal Revenue Code, the deduction for charitable contributions "depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." *Commissioner* v. *National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 149 (1974); *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 440 (1934). Accordingly, the resolution of this case turns on the scope of Section 170 of the Code, in which Congress has specifically permitted the deduction of certain charitable donations and delineated the limitations on that deduction. That provision defines a "charitable contribution," for which a deduction from gross income generally is allowed, as a "contribution or gift to or for the use of" eligible organizations, which include entities organized and operated exclusively

for religious and charitable purposes.[3]

Section 170 of the Code dates back to Section 1201(2) of the War Revenue Act of 1917, ch. 63, 40 Stat. 330, which authorized a deduction for "[c]ontributions or gifts actually made * * * to corporations or associations organized and operated exclusively for religious, charitable, scientific, or educational purposes * * *." This provision was carried forward without any change pertinent here in Section 214(a)(11) of the Revenue Act of 1918, ch. 18, 40 Stat. 1068. Citing the statutory requirement that the gift be made "to" a qualifying organization, the Bureau of Internal Revenue took the position that this provision did not authorize deductions for contributions to a trust or foundation that received and held the donated funds for investment and ultimate disbursement for a charitable purpose, because the trust or similar entity was not itself operated exclusively for religious or charitable purposes. See O.D. 669, 3 C.B. 187 (1920). In 1921, Congress responded to the Bureau's interpretation by amending the statute to permit deductions for contributions "to or for the use of" qualifying organizations, thereby covering contributions to trusts or similar entities that administer funds for eventual distribution to a qualifying charity. Section 214(a)(11) of the Revenue Act of 1921, ch. 136, 42 Stat. 241.[4] The 1921 provision was later incorporated into the Internal Revenue Codes of 1939 and 1954.

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[3] The IRS publishes a list of organizations that qualify for tax-deductible contributions. The Church is included on this list, as it was at the time of the payments at issue. See Pet. App. 39a; IRS Publication No. 78, *Cumulative List of Organizations* 276 (1989).

[4] The legislative history of the 1921 amendment indicates that the phrase "for the use of" was added for the specific purpose of overturning this Treasury decision, and that it was not intended to effect a significant change in the statute. See 61 Cong. Rec. 5294 (1921) (amendment not "very material") (statement of Rep. Green); see generally pages 25-27, *infra*; J. Seidman, *Legislative History of Federal Income Tax Laws (1939-1861)* 838 (1938). Accordingly, the added phrase has been construed "as intended to convey a meaning similar to 'in trust for' " (*Thomason* v. *Commissioner*, 2 T.C. 441, 444 (1943)). The 1921 amendment also added the phrase "or community chest, fund, or foundation" to the description of organizations eligible to receive tax-deductible contributions.

This statutory scheme governing the deductibility of amounts claimed as charitable contributions thus has two major components. First, the payment must qualify as a "contribution" or "gift," which excludes payments made with the expectation of a commensurate return or quid pro quo. See generally *Hernandez* v. *Commissioner*, 109 S. Ct. 2136, 2143-2144 (1989). Second, even if the payment is a gift in the sense that it is made without the expectation of a return benefit, no deduction is allowed unless the contribution is made "to or for the use of" a qualified organization. This second major component, which is the one at issue here,[5] may have the effect of denying a deduction for payments that would ordinarily be regarded as motivated by a "charitable" intent, such as a donation to a needy individual. See, *e.g.*, *Dohrmann* v. *Commissioner*, 18 B.T.A. 66, 68 (1929). Nevertheless, the statutory requirement that charitable contributions be made "to or for the use of" a qualified organization is integral to the congressional scheme, and it must be scrupulously observed.

This qualified donee requirement is grounded in the basic policy underlying Section 170. The rationale for allowing a taxpayer to take a deduction for charitable contributions to private organizations is the belief that these contributions serve the public good. As this Court explained in *Bob Jones University* v. *United States*, 461 U.S. at 588, the deduction provided by Section 170 is intended "to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind." See also *id.* at 587-590 & n.11; *Trinidad* v. *Sagrada Orden de Predicadores*, 263 U.S. 578, 581 (1924) (tax exemption for charitable organizations provided "in recognition of the benefit

[5] The government's summary judgment motion rested on the argument that the payments in question here were not made "to or for the use of" a qualified organization; the government did not there dispute that petitioners' payments constituted "contributions or gifts" within the meaning of the statute. In the event that the distict court's grant of summary judgment is reversed, the question whether petitioners' payments for the living expenses of their children are "contributions or gifts" will remain open in any subsequent proceedings that may be necessary.

which the public derives from corporate activities of the class named").[6]

The legislative history reveals that this object of furthering the public welfare has always been at the forefront of Section 170 and its predecessors. In justifying the deduction when it was first proposed in 1917, one Senator explained: "For every dollar that a man contributes for these public charities, educational, scientific, or otherwise, the public gets 100 percent." 55 Cong. Rec. 6728 (1917) (statement of Sen. Hollis). See also 61 Cong. Rec. 5294 (1921) (statement of Rep. Green) ("The gifts must be made exclusively for public purposes"). Congress elaborated upon this theme when it reenacted the deduction for charitable contributions in the 1939 Code. The House Report explains (H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938)): "The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare." See also H.R. Rep. No. 1337, 83d Cong., 2d Sess. A44 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 196 (1954).

As this Court has recognized, Congress was guided in instituting the charitable exemption and deduction provisions by the law of charitable trusts. *Bob Jones University* v. *United States*, 461 U.S. at 588 & n.12; see also H.R. Rep. No. 413, 91st Cong., 1st Sess. Pt. 1, at 35, 43 (1969). An essential characteristic of the basic idea of "public charity" that underlies charitable trust doctrine is the concept of "uncertainty" or "indefiniteness" of beneficiaries. This Court stated in *Russell* v. *Allen*, 107 U.S. 163, 167 (1882), that charitable trusts "may, and indeed must, be for the benefit of an indefinite number of per-

[6] This concept accords with the commonly understood "legal meaning" of "charity." See *Kain* v. *Gibboney*, 101 U.S. 362, 365 (1879) ("Charity is generally defined as a gift for public use. Such is its legal meaning."); *Perin* v. *Carey*, 65 U.S. (24 How.) 465, 506 (1860) ("[C]harity is a gift to a general public use.").

sons; for if all the beneficiaries are personally designated, [there is lacking] the essential element of indefiniteness, which is one characteristic of a legal charity." See also B. Hopkins, *The Law of Tax-Exempt Organizations* 72-73 (5th ed. 1987). This principle of indefiniteness is well established in trust law. Section 375 of the *Restatement (Second) on Trusts* (1959) provides: "A trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust." See also *id.* at Comments a, b, c, and d; G. Bogert, *The Law of Trusts and Trustees* § 363 (1977); 4 A. Scott, *The Law of Trusts* §§ 364, 375 (1967).[7]

This concept of indefiniteness of beneficiaries as a characteristic of public charity underlies the requirement that a contribution must be made to a qualified organization in order to be deductible. Organizations qualify for tax-exempt donations only if they promote the public welfare according to the standards established by Congress; accordingly, donations to these organizations are statutorily presumed to be dedicated to a public purpose in accordance with the public charity concept that is at the root of Section 170. On the other hand, payments not made to or for the use of these organizations, even if motivated by a benevolent intent to aid a needy individual, do not meet the standards established by Congress for a deduction. If the payment is directed to a specific beneficiary, the motive may be generous but it lacks the "indefiniteness" that characterizes the type of "public charity" that Congress determined to encourage in the Internal Revenue Code. As the Tax Court explained in denying a claimed deduction for a contribution made on the condition that the money be used to benefit a particular individual: "Charity begins where certainty in beneficiaries ends, for it is the uncertainty of the objects and not the mode

[7] Moreover, the Solicitor of Internal Revenue specifically looked to the law of charitable trusts in giving an early interpretation of the charitable deduction provisions of the Code; he stated that " '[a] gift is a public charity when there is a benefit to be conferred on the public at large, or some portion thereof, or upon an indefinite class of persons.' " Sol. Op. 159, III-1 C.B. 480, 482 (1924); see *Bob Jones University* v. *United States*, 461 U.S. at 590 n.15.

of relieving them which forms the essential element of charity. * * * Whenever the beneficiary is designated by name and his merit alone is to be considered, the bequest is private and not public and ceases to have the peculiar merit of a charity." *Thomason* v. *Commissioner*, 2 T.C. 441, 443-444 (1943); see also *Davis* v. *Commissioner*, 55 T.C. 416, 424-425 (1970); *Davenport* v. *Commissioner*, 34 T.C.M. (CCH) 1585, 1587 (1975).

The rule limiting deductions to payments made "to or for the use of" qualified organizations is also critical to the IRS's ability to administer the charitable deduction provisions. Because a charity can lose its tax-exempt status if it permits funds placed under its control to be spent for non-charitable purposes, it has a substantial incentive to ensure that those funds are used as Congress intended.[8] To guarantee that tax-exempt organizations spend their funds in furtherance of the public welfare, the IRS is empowered to audit their affairs and records, and it may revoke an organization's tax exemption, even retroactively, if the organization has acted inappropriately.[9] The effect of requiring donations to be placed under the control of a qualifying organization, viewed in the context of this comprehensive administrative scheme, is to enable the IRS to perform its oversight responsibilities by monitoring a relatively limited number of recipients. See *Brinley* v. *Commissioner*, 782 F.2d 1326, 1338 (5th Cir. 1986) (Hill, J., dissenting); *White* v. *United States*, 514 F. Supp. 1057, 1061 (D. Utah), rev'd, 725 F.2d 1269 (10th Cir. 1984).

The efficacy of this oversight system would be significantly hampered if taxpayers could deduct payments made, allegedly for charitable purposes, to individuals or private entities not

[8] See Shaller, *Tax Exemption of Charitable Organizations and the Deductibility of Charitable Donations: Dangerous New Tests*, 8 U. Bridgeport L. Rev. 77, 95 (1987) ("Because a qualified donee is already under scrutiny by the I.R.S., there is a greater likelihood that funds disbursed by these organizations will be used for exempt purposes.").

[9] See 26 C.F.R. 601.201(n)(6); B. Hopkins, *The Law of Tax-Exempt Organizations* 639-664 (5th ed. 1987). See generally S. Rep. No. 552, 91st Cong., 1st Sess. 52 (1969) (discussing the IRS's oversight responsibilities).

recognized by the IRS as qualified donees. Instead of monitoring the activities of a relatively circumscribed group of recognized charities, the IRS could determine the validity of claimed charitabie deductions only by audits of enormous numbers of individual taxpayers. Presumably, the IRS would have to investigate the subjective motivations for privately controlled gifts and the ultimate use made of funds given directly to individuals. Both the massive burden that this responsibility would place on the IRS and the intrusive nature of the inquiry that would be required to investigate charitable deduction claims strongly militate against a departure from the system established in Section 170, which permits the validity of a deduction to be determined largely from its external features—*i.e.*, by ascertaining whether the payment was made to a qualifying organization. See *Hernandez* v. *Commissioner*, 109 S. Ct. at 2144; *United States* v. *American Bar Endowment*, 477 U.S. 105, 118 (1986).[10]

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[10] The commentators have adverted to the severe administrative difficulties that would be posed by departing from the qualified donee system. One commentator observed:

> The presence of the section 501 exemption and the section 170 deduction suggests a rationale for extending a * * * deduction to the taxpayer who gives cash or other property directly to a person likely to qualify for benefits from public charity. Why the tax system does not allow such a deduction * * * may more reflect administrative considerations and concerns about abuse and evasion than any theoretical or policy notions about subsidies and incentives. The Service would have difficulty distinguishing deductible private charitable gifts from nondeductible family support or transfers, sometimes made with the implicit or explicit expectation of some reciprocal benefits.

McNulty, *Public Policy and Private Charity: A Tax Policy Perspective*, 3 Va. Tax Rev. 229, 235 (1984); see also Note, *Does Charity Begin at Home? The Tax Status of a Payment to an Individual as a Charitable Deduction*, 83 Mich. L. Rev. 1428, 1441 (1985) ("Rather than burden the IRS with case-by-case inquiries into taxpayer motive and ultimate benefit, administrative considerations favor requiring that expense donations be sent directly to the qualified organization.")

2. *Payments Withheld From The Control Of A Charitable Organization By Earmarking Them To Benefit A Particular Individual Are Not Deductible*

Although the statutory framework erected by Congress reflects the concern that deductible contributions advance the public good, its application also encompasses the situation where a charity ultimately spends its money for a particular individual. Obviously, many charitable endeavors performed by qualified public charities, such as aid to the needy or a scholarship award, eventually result in expenditures for the benefit of a single person. Where the ultimate beneficiary is unknown to the person donating funds to the qualified organization, the statutory system works properly. It is clear that deductibility furthers Congress's intent; from the perspective of the donor, the contribution is to an indefinite beneficiary and fully accords with the notions of public charity that underlie Section 170. If the individual beneficiary is known to the donor, however, and the donation is earmarked for his benefit, allowing a deduction would run counter to the "public charity" basis for the statutory design. Where Congress has determined that a taxpayer should not be permitted to take a deduction for a gift to an individual, a taxpayer should not be permitted to evade that determination by the mechanism of using a qualified organization as a mere conduit for a payment intended to benefit a particular individual.

The courts and the IRS have grappled with the problems raised by such situations and have agreed that payments to an individual beneficiary cannot be rendered deductible simply by channeling the payments through a qualified charity. In 1962, the IRS issued Rev. Rul. 62-113, 1962-2 C.B. 10, addressing the situation of expenses paid to support missionaries. The IRS ruled that a taxpayer can properly deduct payments made to a church fund dedicated to the support of missionaries, even if the son of the taxpayer is one of the missionaries supported, so long as the taxpayer's donation is not specifically earmarked for the use of that son. The IRS explained the governing principles as follows (1962-2 C.B. at 11):

If contributions to the fund are earmarked by the donor for a particular individual, they are treated, in effect, as being gifts to the designated individual and are not deductible. However, a deduction will be allowable where it is established that a gift is intended by a donor for the use of the organization and not as a gift to an individual.

The test in each case is whether the organization has full control of the donated funds, and discretion as to their use, so as to insure that they will be used to carry out its functions and purposes.

In the instant case, the son's receipt of reimbursements from the fund is alone insufficient to require a holding that this test is not met. Accordingly, unless the taxpayer's contributions to the fund are distinctly marked by him so that they may be used only for his son or are received by the fund pursuant to a commitment or understanding that they will be so used, they may be deducted * * *.

See also Rev. Rul. 79-81, 1979-1 C.B. 107 ("donation" to college in amount of required fee and listing name of student to whose account donation could be applied is not deductible); Rev. Rul. 68-484, 1968-2 C.B. 105 (payment to scholarship fund where university selects recipient is deductible).

The courts generally have looked to similar principles relating to the organization's discretion and control over the funds when considering the deductibility of "earmarked" payments to a qualified donee. Thus, in *Tripp* v. *Commissioner*, 337 F.2d 432, 435-436 (7th Cir. 1964), the court held that a taxpayer's payments to a college scholarship fund, which he had designated to finance the education of a particular individual, were not deductible because they were "not to a general scholarship fund to be used as the college saw fit but were to be applied to the educational expenses of" the individual (*id.* at 436). In *Winn* v. *Commissioner*, 595 F.2d 1060 (5th Cir. 1979), a church sponsored several "days" to raise funds from the community to pay the expenses of a missionary being sent overseas. The court ruled that donations made to the church for this purpose were deductible because, *inter alia*, "an officer of the church took

the funds donated and dealt with them as the church wished" (*id.* at 1065). In *Peace* v. *Commissioner*, 43 T.C. 1, 7-8 (1964), the Tax Court considered the issue of contributions made to a mission for the purpose of paying the expenses of missionaries. Citing approvingly the analysis of Rev. Rul. 62-113, the court held that the contributions were deductible because "[t]he mission had exclusive control * * * of both the administration and distribution of the funds donated by the [taxpayers]" (*id.* at 7).

The principles developed in these earmarking cases have been utilized by courts in considering the converse situation presented here—where a payment is made not to a charitable organization, but directly to an individual, and the taxpayer argues that the payment should be regarded as "to or for the use of" the organization because of the individual's relationship to the organization. If no deduction is allowed for payments made "to" a qualifying organization that are earmarked for the benefit of an individual, because the condition attached to the payment prevents the organization from directing its disposition, it logically follows, *a fortiori*, that payments made *directly to an individual* cannot be deducted as "to or for the use of" a qualified organization if the organization lacks discretion over the disposition of the funds. Accordingly, as the district court below recognized (Pet. App. 23a-24a), the courts have consistently held that, where a payment is made directly to an individual or for his account, the payment cannot be regarded as "to or for the use of" an organization unless the organization exercises control over the disposition of the funds. The prevailing rule was explained by the Tax Cour. in *Davenport* v. *Commissioner*, 34 T.C.M. (CCH) 1585 (1975), where the court disallowed a deduction claimed for amounts paid by the taxpayer as rent for a house to be used by his son, the church's minister. The court stated (*id.* at 1587-1588):

> The cases are clear that the criteria for determining whether an amount is a charitable contribution is not whether the payment which is not made directly to the charity might incidentally relieve the charity of some cost

> but rather whether the payment is such that the contribution is "for the use of" the charity in a meaning similar to "in trust for." • • • [B]y making the payments directly to the landlord [the taxpayer] took the option of the [charity] with respect to its use of the funds. As we have pointed out in several cases, the charity must have full control of the funds donated in order for a taxpayer to be entitled to a charitable deduction, and such is not the situation where the funds are designated by the donor for the use of a particular individual. [11]

This approach is rooted in the fundamental distinction drawn by Congress between deductible "public" charity, which is directed at indefinite beneficiaries, and nondeductible "private" charity. Thus, in *Thomason* v. *Commissioner, supra*, the court denied a deduction for payments made to a school on behalf of an individual who was the legal ward of a welfare society. The taxpayer had claimed a deduction on the theory that the payments relieved the society of a financial burden, but the court concluded (2 T.C. at 444-445): "The sums were paid by petitioner for the benefit of a designated individual and for no other individuals or for no other purpose of the society. These contributions may not be regarded as gifts to or for the society. They were gifts to and for the benefit of this particular child and no one else." [12] See also *McMillan* v. *Commissioner*, 31 T.C.

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[11] The Tax Court repeatedly has rejected similar efforts to deduct payments made directly to missionaries or other individuals to pay their expenses, because of the organization's lack of control over the disposition of the funds. See *Diab* v. *Commissioner*, 39 T.C.M. (CCH) 561, 567 (1979), aff'd, 688 F.2d 842 (7th Cir. 1982) (deductions for payments to individuals disallowed because funds were not placed "under the direct control" of the organization); *Cook* v. *Commissioner*, 37 T.C.M. (CCH) 771, 774 (1978) (support payments made directly to ministers not deductible because the funds were not "under the direct control of" the organizations); *Mayo* v. *Commissioner*, 30 T.C.M. (CCH) 505, 507 (1971) (donation made directly to two Mennonite missionaries not deductible because not made "through established Mennonite organizational channels").

[12] By contrast, the court stated that, "if an exempt organization incurs liabilities in the general performance of its functions and requests its donors to pay their contributions to its creditors, the payments would be 'for the use of' the charity" (2 T.C. at 444).

1143, 1146-1147 (1959) (payments for expenses of child who was the responsibility of adoption agency). In sum, deduction of a contribution to an individual, whether paid directly or through a conduit, is inconsistent with the congressional design unless a qualified donee is given discretion over the disposition of the funds.

3. Petitioners' Direct Payments To Their Children For Living Expenses Were Committed To The Control Of An Individual, Not The Church, And Hence Are Not Deductible As Made "To Or For The Use Of" The Church Under Section 170

Under these principles, petitioners' claimed charitable contributions clearly cannot be regarded as having been made "to or for the use of" the Church within the meaning of Section 170. The payments were made directly to individuals for use in satisfying their personal expenses—food, shelter, and transportation.[13] Thus, the payments were not dedicated to the use of the Church or some other public purpose; rather, they were dedicated to the primarily private purpose of paying the personal expenses of the individual recipients.[14] Moreover, the in-

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[13] As a general rule, the Code does not permit the deduction of personal expenses. See I.R.C. § 262 ("Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living or family expenses").

[14] This is not to say that the payments *in no way* serve a public purpose. Petitioners' children were serving as missionaries of the Church, and therefore payments for their support were to some extent in furtherance of the Church's goals that have been recognized as serving a public, charitable purpose. If paid by the Church, such payments to support individual missionaries would be fully in accord with the Church's tax-exempt status. But the payment of funds to an individual to be spent on his personal living expenses directly and predominantly serves the individual's private purposes. The situation is analogous to a salary paid to an employee of a charitable organization. The payments are made directly for the personal benefit of the individual, but they

dividuals being supported here were petitioners' own sons, the "natural objects of their bounty" (*Davis* v. *Commissioner*, 55 T.C. at 424). Thus, petitioners are seeking a tax deduction for payments that they could be expected to make for their own personal reasons even if the recipients had no relationship to a charitable organization. See *Brinley* v. *Commissioner*, 782 F.2d at 1338 (Hill, J., dissenting); compare *Orr* v. *United States*, 343 F.2d 553, 557 (5th Cir. 1965) ("The words 'gift to or for the use of' will not stretch to include payments which the taxpayer would have made for non-charitable reasons."). Indeed, the record shows that petitioners were supporting Cecil before he began his missionary service (J.A. 15-16); their contention that the continuation of this support was transformed from a personal expense to a charitable contribution because Cecil decided to leave school and serve as a missionary stretches Section 170 well beyond its language and the apparent intent of Congress.

The payments here plainly did not satisfy the requirements discussed above for establishing deductibility. The Church never took possession of the funds or had any opportunity to use them or to exercise any discretion or control over how they would be spent. The district court found (Pet. App. 24a):

> [I]t is clear that the missionary sons had true "control" over the funds in question. * * * The particular use to which the funds were put was solely within the power of the missionary. * * * [T]he only role the church played in the distribution of the funds to the missionaries was to provide a projected budget range that would be needed for the particular area in which the missionary would be serving.

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indirectly benefit the charity—and further its public purposes—because the employee's services assist the charity in its mission and the employee will not provide those services unless he is paid a salary on which he can live. Similarly here, the support payments to the missionaries directly confer a private, personal benefit upon them—by enabling them to obtain food, lodging, and other necessities; the payments confer a more attenuated benefit upon the Church by making it possible for the missionaries to conduct their work.

> Beyond that information provided by the church, there is no indication that the church was involved in any way in controlling how the missionary's money was spent.

Petitioners placed the funds directly into their sons' personal bank accounts, and the sons were free to spend the money as they saw fit. Thus, as the court of appeals concluded, "the particular use to which the funds were put was solely within the control of the missionaries[;] * * * other than requiring the missionaries to submit weekly reports of their expenses, the Church had no discretion over the disposition of the funds" (*id.* at 9a). Moreover, the Tax Court unanimously reached the same conclusion on essentially identical facts in its reviewed decision in *Brinley* v. *Commissioner*, 82 T.C. 932 (1984), rev'd, 782 F.2d 1326 (5th Cir. 1986), holding that "since the funds were given directly to petitioners' son for his personal use and could be expended by their son as he wished without accounting to anyone, petitioners' contributions did not satisfy the control requirement" (82 T.C. at 933) and hence were not deductible under Section 170. See also 82 T.C. at 939-941; *Brinley* v. *Commisioner* 782 F.2d at 1339-1341 (Hill, J., dissenting). In sum, whatever petitioners' motivation, and notwithstanding any incidental benefit enjoyed by the Church, petitioners' transfer of funds to the control of their own children does not qualify as the kind of charitable contribution for which Congress provided a deduction in Section 170.[15]

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[15] The commentators generally have agreed with the position adopted by the court below, criticizing those decisions that have allowed deductions for payments to support the taxpayer's child during his missionary service. See Shaller, *supra*; Blasi & Denesha, *Avoiding Disallowance of Earmarked Charitable Contributions*, 9 Rev. of Tax'n of Individuals 160, 169-170 (1985); Note, *Charitable Deductions for Missionary Support: Conflict Between* White *and* Brinley, 5 Va. Tax. Rev. 203 (1985); Note, *Does Charity Begin at Home? The Tax Status of a Payment to an Individual as a Charitable Deduction*, 83 Mich. L. Rev. 1428 (1985); Note, White *v.* United States: *Tenth Circuit Allows Parents "Charitable Contribution" Deduction for Support Payments Made Directly to Mormon Missionary Son*, 62 Den. U.L. Rev. 331 (1984); but see Note, *A Tax Deduction for Direct Charitable Transfers: The Case Against* Davis *v.* United States, 64 Wash. L. Rev. 935 (1989); Note, *Earmarked Charitable Contributions: In Search of a Standard*, 50 Mo. L. Rev. 918 (1983).

B. Petitioners' Novel And Exceedingly Broad Interpretations Of The Phrase "To Or For The Use Of" Are Erroneous

1. *Section 170 Does Not Permit The Deduction Of Payments Made To Individuals Simply Because The Payments Confer Some Benefit Upon A Charitable Organization*

Petitioners contend (Br. 17-20, 23-24) that the phrase "for the use of" connotes a common law "fiduciary relationship." Petitioners do not use this term to refer to *legal* fiduciary relationships, such as trusts or guardianships. Rather, they contend that it extends to the broad array of relationships in which one person is asked to "employ [funds] in some manner for the benefit of a third person" (Pet. Br. 17) or, indeed, to " 'those informal relations which exist wherever one man trusts in or relies upon another' " (*id.* at 24). Petitioners also maintain that "the phrase 'for the use of' is often used interchangeably with 'for the benefit of' " (*ibid.*). Petitioners conclude that Section 170 therefore permits a taxpayer to take a deduction for payments made to individuals who have this kind of informal fiduciary relationship with a qualified donee, so long as "the contribution [is] made to a third party fiduciary in a manner that will benefit a charitable organization" (Pet. Br. 24). This novel interpretation bears little relation to the text of Section 170 or to the intentions of its drafters.

As this Court has emphasized on many occasions, the " 'starting point in every case involving construction of a statute is the language itself' " (*Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985), quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). See also *United States* v. *Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1030 (1989); *Watt* v. *Alaska*, 451 U.S. 259, 265 (1981). Petitioners' interpretation of Section 170 is not supported by the statutory text. Indeed, petitioners themselves acknowledge that their position does not reflect "the ordinary meaning" of the phrase "for the use of" (see Pet. Br. 25 n.11). The statutory phrase clearly contemplates that, at some point, the charity will be able to "make use" of the donated funds. But if an organization has no authority over certain funds, it cannot "use" them in

the ordinary sense of the word. See, *e.g.*, *Webster's Third New International Dictionary* 2523-2524 (1986) (primary synonyms for "use" are "employ" or "utilize"). Consequently, if funds are transferred to a third party under circumstances that will not ultimately provide a charitable organization with discretion over their disposition, the funds would not ordinarily be regarded as having been given "for the use of" that organization. See *Peace* v. *Commissioner*, 43 T.C. at 7; *Thomason* v. *Commissioner*, 2 T.C. at 444 ("for the use of" connotes a " 'right of exclusive appropriation or enjoyment of the thing donated' ").[16]

The legislative history of Section 170 makes clear that the phrase "for the use of" was added for a relatively circumscribed purpose, not to make a significant alteration in the existing statutory system that made contributing "to" a qualified donee one of the fundamental prerequisites for a deduction. As we have noted (see page 11, *supra*), the original predecessor of Section 170 had allowed deductions only for contributions "to" charitable organizations, and the Bureau of Internal Revenue had interpreted the statute to mean that deductions could not be taken for payments made directly to trusts, community chests, and other types of charitable foundations because those organizations, although they served as conduits for contributions to qualified charities, were not themselves qualified donees. See O.D. 669, 3 C.B. 187 (1920). In *Rockefeller* v. *Commissioner*, 676 F.2d 35, 40 (2d Cir. 1982), the Second Circuit described the organizations adversely affected by the Bureau's ruling as follows: "These organizations were common

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[16] Petitioners cite (Br. 17 n.3) several cases construing the phrase "for the use of" in contracts or other documents as creating third party beneficiary rights. These decisions in no way suggest, however, that the phrase should be interpreted as meaning "for the benefit of" in Section 170 or any other statute. In contrast to these decisions construing contractual language in favor of third party beneficiaries, in *Wagner* v. *United States*, 573 F.2d 447 (7th Cir. 1978), the court held that an Indiana statute's reference to trusts "for the use of" a debtor connoted actual control and applied only to trusts in which the debtor could determine how the corpus would be spent. See also *Chartwell Communications Group* v. *Westbrook*, 637 F.2d 459, 465 (6th Cir. 1980) (construing the phrase "for the use of" in Section 605 of the Communications Act of 1934, 47 U.S.C. 605).

law trusts; legal title to the contributions remained vested in a trustee which invested the funds prior to disbursement to various charitable organizations." See also *Hearings on H.R. 8245 Before the Senate Comm. on Finance*, 67th Cong., 1st Sess. 531 (1921) [hereinafter *Senate Hearings*].

When Congress was considering the Revenue Act of 1921, representatives of these common law trusts sought legislative relief from the Bureau's ruling. In testimony before the Senate Finance Committee, various representatives of these trusts argued that a deduction should be allowed for payments made to the trusts because they merely operated as "custodian[s]" of the funds until their eventual disbursement to a qualified charity. See *Senate Hearings*, at 521-526, 530-532.[17] The witnesses advised Congress that the changes they sought were limited to expanding the statute to include payments made directly to trustees or foundations.[18] And they proposed legislation that

[17] Mr. Garfield, testifying on behalf of the Cleveland Foundation, explained his position as follows (*Senate Hearings*, at 524):

> The point where we found difficulty under the present statute was that the Internal Revenue Office held that a foundation did not come within the definition of a corporation or association organized and operated exclusively for charity, for the reason that a trust company was nominated as the trustee to hold the title. However, the trust company, as trustee, sim[illegible]ds these funds and derives no pecuniary advantage other than f[illegible]e for the actual handling of the funds: it is merely the custo[illegible]nd reinvestment; it derives no pecuniary advantage by [illegible]lationship. It is in exactly the same situation that a trust company [illegible]ld be in if a college turns over to the trust company its funds for investment and handling, which is often done. It does not change the character of the fund, but the college employs a certain bank or trust company to administer and hold its fund subject to the orders of its officers.

[18] William Greenough, representing the New York Community Trust, testified as follows (*Senate Hearings*, at 530):

> Our whole request here is that the sections of the income tax be made harmonious with this provision [of the estate tax allowing deductions for gifts not only to corporations organized for charitable purposes but also to trustees for similar purposes]. • • • That in itself is absolutely all we are asking for.

would cure this difficulty by, *inter alia*, inserting the phrase "for the use of" a qualifying organization. See *id.* at 526.

Congress complied with the request of the trust representatives and enacted Section 214(a)(11) of the Revenue Act of 1921, ch. 136, 42 Stat. 241, adding the phrase "or for the use of" to the predecessor of Section 170. The discussion of this change in the committee reports and on the floor of Congress is sparse, but it indicates that Congress did not regard this a major change in the statute, but rather one calculated to alleviate the narrow concern expressed by the trust representatives. The House Report states simply that the section "would allow the deduction, under proper restriction, of contributions or gifts to a community chest fund or foundation" (H.R. Rep. No. 350, 67th Cong., 1st Sess. 12 (1921)). See also S. Rep. No. 275, 67th Cong., 1st Sess. 18 (1921). And when asked on the floor of the House to describe the effect of the change, one of the managers of the legislation stated (61 Cong. Rec. 5294 (1921) (statement of Rep. Green)): "This somewhat enlarges it. It does not make any very material change. It broadens it somewhat."

The contemporaneous administrative and judicial interpretations agreed that the new language had a relatively narrow scope, designed to address the defect in the original statute with respect to donations made to a trust for investment and eventual distribution to charity. Shortly after the statute was amended, the Treasury ruled on the question whether a contribution to a volunteer fire company—a private, nonqualifying organization—could be deducted as "for the use of" the local municipality. I.T. 1867, II-2 C.B. 155 (1923). Stating that the "for the use of" language recently added to the statute was "intended to convey a similar meaning as 'in trust for' " (*id.* at 155), the Treasury concluded that the contribution was not deductible.[19] The deci-

[19] The Treasury decision explained (II-2 C.B. at 155):

> "[T]he contribution is made to a private corporation, to be used by that corporation, although for the benefit of the inhabitants of the municipal corporation. The donation is not for the use of such inhabitants, but for their benefit, and clearly it cannot be claimed that it is for the use of the municipal corporation • • • . It does not appear that the municipality in

sion maintained that "the phrase 'for the use of' seems to carry with it a right of exclusive appropriation or enjoyment of the thing donated" (*id.* at 156). See also, *e.g.*, Rev. Rul. 55-275, 1955-1 C.B. 295, 296; I.T. 3707, 1945 C.B. 114. And the courts have also recognized on several occasions that the language added in 1921 was intended to have a similar meaning to "in trust for"—to cover payments to an intermediary trust that ultimately will be distributed to a charity. See *Rockefeller* v. *Commissioner*, 676 F.2d at 40; *Orr* v. *United States*, 343 F.2d at 557-558; *Davenport* v. *Commissioner*, 34 T.C.M. (CCH) at 1587; *Thomason* v. *Commissioner*, 2 T.C. at 444; *Danz* v. *Commissioner*, 18 T.C. 454, 464 (1952), aff'd on other grounds, 231 F.2d 673 (9th Cir. 1955), cert. denied, 352 U.S. 828 (1956); *Bowman* v. *Commissioner*, 16 B.T.A. 1157, 1162-1164 (1929).

Congress has also evinced its understanding of the relatively narrow scope of the phrase "for the use of" in Section 170. In the 1954 Code, Congress for the first time after 1921 made the distinction between contributions "to" an organization and contributions "for the use of" an organization significant in determining the amount of the deduction. Prior to 1954, an individual's charitable contributions were limited (except in certain circumstances where unlimited deductions were allowed) to 20% of his adjusted gross income. In 1954, Congress permitted taxpayers to use an additional 10% of their income for deductible contributions made "to" a charity, but this enlargement of the ceiling expressly did not apply to contributions made "for the use of" a charity. In explaining this distinction, the congressional committees noted that its effect would be to exclude from the additional deduction "payments to a trust (where the beneficiary is a [qualified organization])". H.R. Rep. No. 1337, 83d Cong., 2d Sess. A53 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 207 (1954).

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any way has any control over the property of the incorporated volunteer fire company or that it has any voice in the manner in which such property should be used."

In 1964, Congress made another change yielding different tax consequences for the two kinds of contributions; it provided that contributions "for the use of" a charity would no longer be eligible for the unlimited deduction granted in certain circumstances by Section 170(b)(1)(C). On this occasion, Congress explained the rationale for the distinction—namely, to encourage contributions that are transferred immediately to charity in contrast to contributions to fiduciaries that are delayed before they find their way to the qualified organization. The Senate Report stated (S. Rep. No. 830, 88th Cong., 2d Sess. 60 (1964)):

> Your committee believes that the special advantage of the unlimited charitable contribution deduction should not be made available in the case of these foundations because frequently contributions to foundations do not find their way into philanthropic endeavors for extended periods of time.

See also H.R. Rep. No. 749, 88th Cong., 2d Sess. 53 (1964) ("These • • • organizations frequently do not make contributions to the operating philanthropic organizations for extended periods of time and in the meanwhile use the funds for investment."). Thus, Congress has understood the term "for the use of" to refer to payments that, while paid by the donor to a trust or similar entity instead of directly to a qualified donee, will ultimately find their way to the control of a qualified donee.

In sum, the text, legislative history, and judicial and administrative constructions of Section 170 all indicate that it was never intended to permit the deduction of all payments that might in any way benefit a charitable organization; rather, the "for the use of" language was designed to permit the current deduction of payments to trusts or similar fiduciaries who receive payments from the donor for eventual distribution to qualifying charities. See, *e.g.*, *Rockefeller* v. *Commissioner*, 676 F.2d at 41 ("for the use of" language intended to apply to situations in which "contributions often do not reach the charitable beneficiaries for a long period of time"). There is

no justification for stretching the statutory text to extend it to transfers to "informal" fiduciaries who have no legal obligation to manage and distribute the funds to the charitable beneficiary, or, indeed, to anyone who proposes to use the funds in a way that will confer a benefit upon some charitable organization (see Pet. Br. 24). The courts below correctly concluded that Congress's insertion of the phrase "for the use of" in Section 170 was not intended to discard the fundamental requirement that deductible contributions be committed to the control of a qualifying charity. The statutory amendment merely made the statute more flexible by permitting some delay between the time a payment is deducted and the time that the funds are placed within the control of a qualified recipient. There is simply no basis for concluding that Congress intended the words "for the use of" to apply to a myriad of situations where, as here, donated funds never come within the control of a qualifying organization.[20]

Petitioners' exceedingly broad interpretation of Section 170—covering any payment that can be viewed as "for the benefit of" a charity—plainly would extend the scope of the charitable contribution deduction far beyond what Congress intended. For example, a taxpayer might regard tuition payments to a parochial school as conferring a benefit upon the school by freeing up scholarship funds for other students. Or a taxpayer might claim a deduction for payments to an indigent, taking the

[20] Petitioners devote considerable effort (see Br. 11, 16-23, 27-28) to demolishing a "straw man"—the idea that the court of appeals held that a contribution is deductible only if the taxpayer transfers it to the "actual possession" of a qualified donee. The court of appeals never formulated such a holding; its opinion acknowledged what is apparent from the face of the statute—that Section 170 covers some transfers that are not made directly "to" the actual possession of a qualified donee. See Pet. App. 9a. The court of appeals recognized, however, that the 1921 amendment was designed to build on the scheme established by Congress that had required transfer "to" a qualified donee by broadening the statute to cover other transactions that are closely analogous to such direct transfers, such as payments to a trust for eventual distribution to a charity. Contrary to petitioners' submission, that amendment did not create an entirely new scheme that authorized deductions for payments bearing no similarity to transfers to qualified donees.

view that his payments benefitted qualifying charities by relieving them of the cost of providing food and shelter for that individual. Or a taxpayer might claim a deduction for the cost of living expenses provided to a ward of a welfare society because it relieved the society of its support obligation. These types of payments, even though they might incidentally benefit qualifying organizations, have long been held not to be deductible. See, *e.g.*, *Winters* v. *Commissioner*, 468 F.2d 778 (2d Cir. 1972) (tuition payments); *Thomason* v. *Commissioner*, *supra* (support payments to ward); *Dohrmann* v. *Commissioner*, *supra* (donation to indigent).

Indeed, petitioners' interpretation would appear to authorize deductions for payments that heretofore no one has even suggested as falling within the ambit of Section 170. Many individuals work for charitable organizations for relatively low salaries or as volunteers. If their parents contribute to their support, or give them money to help purchase a car, is that contribution tax deductible? Surely the organization is benefitted if the parental support enables a valued employee to continue working for the organization, rather than moving on to a higher-paying job elsewhere. Or suppose a college student studying marine biology spends his summer as a volunteer with a group that is working to preserve aquatic wildlife habitats. Are the funds that his parents send to him to defray his living expenses for the summer deductible as "for the benefit of" some qualifying organization dedicated to wildlife preservation?

Indeed, one example closely analogous to the facts of this case plainly demonstrates that petitioners' interpretation of Section 170 is erroneous. Suppose a taxpayer recognizes a missionary on the street and says: "I admire the work that you are doing, and I would like to help." The taxpayer then offers to treat the missionary to dinner or, alternatively, gives him $10 that he spends on food. If the taxpayer had shown the same generosity to an indigent, the payment clearly would not be deductible. The payment should not be any more deductible when it is a missionary, instead of an indigent, who is the beneficiary of a free dinner, and there is no reason to suppose

that Congress intended such a result. And when the taxpayer is not a benevolent stranger, but rather is the missionary's own parents, the argument for a deduction is even weaker. In sum, petitioners' position cannot be reconciled with one of the basic underpinnings of the system erected by Congress—namely, the advancement of "public charity" by requiring tax-deductible contributions to be made "to or for the use of" qualifying organizations, not individuals.[21]

2. *The Church's Estimate Of A Missionary's Likely Expenses And Its Review Of His Activities Do Not Establish "Control" Over The Disposition Of His Personal Funds Sufficient To Justify A Deduction For Payments That Parents Make To Their Missionary Children*

Petitioners also contend (Br. 25-27) that, to the extent Section 170 requires control by a charity as a prerequisite to deductibility, that standard was satisfied here. Relying on the court of appeals' decision in *Brinley* v. *Commissioner*, *supra*, they maintain that the Church exercises both "front-end" control over the

[21] Petitioners seek to justify their expansive interpretation of the phrase "for the use of" by invoking an alleged rule of construction that Section 170 is to be "broadly construed in favor of the taxpayer" (Pet. Br. 15) or read "favorably to the taxpayer" (*id.* at 27, 42). The case that petitioners cite for this proposition (Br. 14), *Helvering* v. *Bliss*, 293 U.S. 144, 151 (1934), however, merely states that the charitable contribution deduction provision should "not • • • be narrowly construed" because it is motivated by "public policy" considerations. This statement does not suggest a general principle of construing the provisions "in favor of the taxpayer," especially in light of this Court's repeated admonition that deductions should not be allowed except to the extent "there is a clear provision therefor" (*Commissioner* v. *National Alfalfa Dehydrating & Milling Co.*, 417 U.S. at 149). Moreover, since petitioners' interpretation of the statute does not further the public policy considerations that underlie Section 170 (see pages 12-15, *supra*) because it facilitates the deduction of payments made to an individual, this observation by the Court in *Bliss* provides little support for petitioners' statutory construction. In any event, the decision of the courts below rejecting petitioners' claimed deduction does not rest on a "narrow construction" of Section 170. Rather, it is compelled by the plain meaning of the text and the relevant indicia of legislative intent. Compare *Better Business Bureau* v. *United States*, 326 U.S. 279, 283 (1945).

funds, because the claimed deduction is limited to the amount of mission expenses estimated by the Church, and "back-end" control, because the missionaries are required to submit periodic reports of their activities, including the total amount of expenditures. This "extraordinary" (Pet. Br. 12) degree of control, petitioners argue, ensures that the funds given to petitioners' sons "primarily serve[ ] the [Church's] own purposes" (*id.* at 26), and hence the payments should be regarded as "for the use of" the Church. This contention is without merit.

Sending a letter to prospective missionaries advising them of the amount of expenses they can expect to incur during their service, even if construed as a "request" to be forwarded to their parents for assistance, hardly gives the Church any meaningful control over funds transferred from parent to child. The finding of the court below that "the particular use to which the funds were put was solely within the control of the missionaries[;] • • • the Church had no discretion over the disposition of the funds" (Pet. App. 9a; see also *id.* at 24a) is unaffected by this asserted "front-end control." At most, the Church's letter provides evidence that the payments for which deductions are claimed were not intended to be frittered away on luxuries. Unless the Code provides a deduction, however, for all payments to individuals who work for charitable organizations and do not live a lavish lifestyle—which it clearly does not—the Church's letter adds nothing to petitioners' argument for deductibility.[22]

[22] The amount estimated by the Church in this case for an appropriate level of expenses plainly cannot be the final word on deductibility under Section 170. For example, suppose another denomination with a missionary program similar to that of the Church determined that its missionaries should receive a modest stipend—approximating the salary of a clerical worker—and therefore sent its missionaries a letter estimating their expenses for one year in New York at $25,000. Petitioners' theory would suggest that parents supporting their missionary child would be entitled to a $25,000 deduction; certainly their deduction would not be limited by the estimate made by the Church in this case. Moreover, suppose a third denomination sent its missionaries a letter requesting them to raise funds for their own support, but not specifying a particular figure. If the parents of one of those missionaries paid him $20,000 in support payments, could the IRS reasonably disallow a deduction for that amount, while allowing the $25,000 deduction in the previous example? Thus, the Church's letter providing the estimate has no proper bearing on the question of deductibility.

The hypotheticals discussed earlier (a: 30-32) would not be materially altered if they included a letter analogous to the ones sent by the Church to the prospective missionaries in this case. If the organization sponsoring the project to preserve aquatic habitats advised the taxpayer's son of his estimated expenses for the summer, the taxpayer's support payment would not become deductible. If a charitable organization offered someone an office job at a salary of $8,000 and noted in the letter that a comparable job at a profit-making institution would pay $12,000, the prospective employee's parents would not be entitled to a $4,000 tax deduction if they agreed to make up the difference so as to enable their child to work for the charitable organization.[23] The result should be the same here.

Petitioners' assertion of "back-end" control is no more persuasive. Missionaries are required to submit weekly reports to Church officials in which they state the total amount of their expenditures for the week. See Pet. App. 44a. Thus, *after* funds have been transferred from parent to son and then spent at the discretion of the son, a Church official is informed *that* the money has been spent; the expenditures are not itemized on the reports so he does not learn *how* the money has been spent. Plainly, this superficial post hoc reporting procedure does not give the Church control over the expenditure of the funds; it simply helps the Church monitor compliance with its policy that missionaries should live frugally. The only actual "back-end control" claimed by the Church is not over the funds, but over the mission itself; the Church assertedly retains the option of cancelling the mission if Church officials determine that the missionary is violating Church policy in financial matters (see Pet. Br. 7 n.1). But this threat (similar to a university's retention

[23] Indeed, it is not necessary to hypothesize such a letter. A successful applicant to a university typically receives a letter notifying him that he has been accepted and providing an estimate of the expenses (tuition, room and board, books, etc.) that he will incur during the school year. If a parent gives the college student the funds to cover these estimated expenses, thereby relieving the university of the need to provide any financial assistance, the acceptance letter does not confer upon the parent the right to a charitable deduction under Section 170.

of power to expel a student) has nothing to do with the only basis for petitioners' claim of a tax deduction—that they have made a contribution "to or for the use of" the Church. If a taxpayer makes a deductible contribution to a qualified organization, he does not lose that deduction if it develops that the organization was not complying with the conditions of its exemption and has its tax-exempt status revoked for the year in which the contributions were made. See 26 C.F.R. 601.201 (n)(3)(iii). Thus, if petitioners' payments to their children were "to or for the use of" the Church when made, petitioners would appear to be entitled to a deduction under their theory regardless of how the funds ultimately were spent or misspent by the missionaries.

In short, petitioners' "control" argument adds little to their basic contention that parents' payments of their children's living expenses during missionary service are deductible because the support of missionaries benefits the Church. This argument must fail. Payments earmarked for the use of a particular individual or paid directly to that individual are not deductible because the beneficiary of the contribution is not indefinite or uncertain, even if the payments indirectly benefit a qualified charity. As Judge Hill stated in his dissent in *Brinley* in rejecting petitioners' "front-end control" analysis (782 F.2d at 1340):

> Such a holding simply ignores the basic thesis that a contribution made with the intent to favor a particular individual, whether earmarked in a contribution to a charity or made to the individual directly, lacks the indefiniteness that qualifies it as a charitable contribution. The contribution made by the Brinleys simply does not meet the eligibility requirements for deductibility under a proper application of the control test.

See also *White* v. *United States*, 514 F. Supp. 1057, 1060-1061 (D. Utah), rev'd, 725 F.2d 1269 (10th Cir. 1984).

3. *The Payments In Question Are Not Deductible On The Theory That They Were Made "To" The Church Because Petitioners' Sons Were Acting As "Agents" Of The Church In Accepting The Payments And Spending The Funds On Their Own Living Expenses*

Petitioners contend (Br. 38-42) for the first time in this Court that their sons were "agents" of the Church for the purpose of receiving and spending contributions for their living expenses, and therefore the payments in question were made "to" the Church. Because this contention was not raised below, its factual underpinnings were not explored in the district court; petitioners suggest (Br. 39) that the sons' status as agents is firmly established by an internal document of the Church introduced as an appendix to the Church's amicus brief in this Court. In fact, the record is clear that "[t]he Church does not want missionaries to receive missionary expense money or other charitable contributions from third parties other than those (usually the family) whom the Church has requested to provide financial assistance" (Pet. App. 33a; J.A. 13). Thus, petitioners' contention apparently is not that their sons were agents of the Church for purposes of collecting contributions to the Church, but rather that they were agents only for the limited purpose of receiving money from their parents and spending it.

In any event, even if petitioners' factual assumptions about their sons' status as agents are correct, their claim for a Section 170 deduction is not enhanced. As we have noted (pages 17-19, *supra*), the courts have consistently upheld the Commissioner's position that "[i]f contributions to [a qualified donee] are earmarked by the donor for a particular individual, they are treated, in effect, as being gifts to the designated individual and are not deductible." Rev. Rul. 62-113, *supra*. Tuition is, of course, the paradigm example; it does not become deductible by being paid in the form of an earmarked contribution to a scholarship fund. Although petitioners appear to disagree with this line of authority, suggesting that their support payments clearly would have been deductible if they had been made directly to the Church with the proviso that the funds be remitted to their children (see Pet. Br. 40, 44), that position is untenable. The distinction between public and private generosity embodied in Section 170 would be eviscerated if a payment could be rendered deductible by the expedient of using a qualified donee as a mere conduit for the transfer of funds from the donor to an individual recipient. But all that petitioners' agency argument can accomplish is the creation of such a conduit. If petitioners gave funds to an "agent" of the Church (their missionary son) earmarked for the specific purpose of paying the living expenses of their missionary son, the case would be no different from one in which they gave the funds directly to their missionary son for that purpose (which is in fact what happened).[24] The question remains whether that payment for their son's support is deductible as "for the use of" the Church because it confers some benefit on the Church. As we have explained, the payment is not deductible because the individual donee, not the Church, exercises discretion over the use of the funds. Under the system established by Congress for ensuring that deductible contributions advance a public purpose, such a payment to the control of an individual beneficiary is not deductible.[25]

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[24] Indeed, even the court of appeals in *Brinley*, which ruled in favor of the taxpayer, recognized that the argument that the missionaries are limited agents of the Church is of little significance. The court stated that the argument "raises 'form over substance' and deviates from the real inquiry: whether the LDS Church had control over the funds and, therefore, discretion as to their use" (782 F.2d at 1335). See also the Tax Court's opinion in *Brinley*, 82 T.C. at 940-941.

[25] This system does not reflect congressional disapproval of private charity, only the conclusion that the public should not subsidize that kind of generosity. The decision of the court of appeals thus does not "force" (Pet. Br. 45) the Church to abandon its traditional way of administering its missionary program. On the contrary, the Church is free to continue to run the program according to its 160-year tradition, relying on the generosity of its members to their children. Taking a tax deduction for payments to support one's child during his mission is not a part of that longstanding tradition. The notion that such payments could be deductible is of fairly recent vintage; indeed, petitioners did not even claim the deduction on their original return filed in 1981.

C. Petitioners' Payments To Support Their Children Are Not Deductible As "Unreimbursed Expenditures" Within The Meaning Of Treas. Reg. § 1.170A-1(g)

From the earliest days of the provision allowing a deduction for charitable contributions, it has been understood that no deduction is allowable for contributions of services. See O.D. 712, 3 C.B. 188 (1920). At the same time, however, the courts recognized that individuals who rendered services to charitable organizations were entitled to deduct the amount of certain expenses, such as travel expenses, that they incurred out-of-pocket in connection with rendition of services to charity. See, *e.g.*, *Wolfe* v. *McCaughn*, 5 F. Supp. 407 (E.D. Pa. 1933); *Upham* v. *Commissioner*, 16 B.T.A. 950 (1929); *Shutter* v. *Commissioner*, 2 B.T.A. 23 (1925). This rule subsequently was embodied by the Commissioner in a formal regulation, Treas. Reg. § 1.170A-1(g), which provides, in pertinent part, as follows:

> *Contributions of services.* No deduction is allowable under section 170 for a contribution of services. However, unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution. For example, the cost of a uniform without general utility which is required to be worn in performing donated services is deductible. Similarly, out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of performing donated services also are deductible.

The courts have consistently interpreted this regulation as permitting a deduction only when the expenses primarily benefit the charity, rather than the taxpayer. See, *e.g.*, *Babilonia* v. *Commissioner*, 681 F.2d 678, 679 (9th Cir. 1982); *Brinley* v. *Commissioner*, 82 T.C. at 936-937. Relying primarily on the Tenth Circuit's decision in *White* v. *United States*, *supra*, petitioners argue (Br. 30-37) that their payments to support their sons are "unreimbursed expenditures" deductible under this regulation.

The court of appeals correctly rejected this contention on the ground that Treas. Reg. § 1.170A-1(g) does not authorize a deduction for unreimbursed expenses by anyone other than the taxpayer who actually renders the services to the qualified charity (see Pet. App. 10a-14a). The text and structure of the regulation clearly indicate that it permits a deduction only by the taxpayer who both incurs the expense and performs the service. See *Brinley* v. *Commissioner*, 82 T.C. at 938. The deduction allowed by the regulation is expressed as an exception to the general rule stated in the first sentence—that no deduction is allowed for a contribution of services. Obviously, this first sentence refers to the taxpayer's own contribution of services. Accordingly, the exception to this general rule to permit the deduction of certain expenses incurred incident to the rendition of services also refers to services rendered by the taxpayer.

Moreover, the language detailing the kind of expenses that may be deducted confirms this conclusion. Deductible expenditures for clothing must relate to articles worn "in performing donated services," transportation expenses must be "out-of-pocket" and "necessarily incurred in performing donated services," and meals and lodging expenses must be "necessarily incurred while away from home in the course of performing donated services." Each of these descriptions clearly envisions that the person entitled to the deduction is the one actually performing the donated services. If parents contribute funds to the support of their child, and the child uses those funds to cover expenses incurred in rendering services to a charity, the parents have no more incurred an "unreimbursed expenditure" than would the child's employer, if the child's expenses had been paid with money he received as wages. Compare *Deputy* v. *du Pont*, 308 U.S. 488, 493-494 (1940).[26]

The Commissioner's interpretation of his own regulation, of course, is entitled to considerable deference. See *Jewett* v. *Com-*

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[26] The Tax Court has consistently held that a taxpayer may not take a deduction for providing funds for a contribution actually made by another. See, *e.g.*, *Herring* v. *Commissioner*, 66 T.C. 308, 312 (1976); *Wilson* v. *Commissioner*, 11 T.C.M. (CCH) 159, 161 (1952).

missioner, 455 U.S. 305, 318 (1982). Moreover, the other relevant guides to the interpretation of Treas. Reg. § 1.170A-1(g) all confirm that it does not allow a taxpayer to deduct expenses incurred by another individual in connection with the latter's services to charity. The revenue ruling that was the precursor to the regulation clearly identified the taxpayer as the one providing the services to charity. The ruling stated (Rev. Rul. 55-4, 1955-1 C.B. 291): "A taxpayer who gives his services gratuitously to an association • • • and who incurs unreimbursed traveling expenses • • • may deduct the amount of such unreimbursed expenses in computing his net income • • •." See also Rev. Rul. 58-240, 1958-1 C.B. 141; Rev. Rul. 56-508, 1956-2 C.B. 126, 128-129. Congress has evinced the same understanding of Treas. Reg. § 1.170A-1(g). Section 142(d) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2120, imposed limitations on the deductibility under Section 170 of unreimbursed travel expenses. The portion of the House Report addressed to this provision explained existing law as follows (H.R. Rep. No. 426, 99th Cong., 1st Scss. 119 (1985) (emphasis added)): "A taxpayer may deduct, as charitable donations, unreimbursed out-of-pocket expenses incurred incident to the rendition of services *provided by the taxpayer* to a charitable organization (Treas. Reg. Sec. 1.170A-1(g))."[27] And, as the Tax Court noted in *Brinley*, with the exception of the two recent court of appeals cases involving the same factual context as this one, the case law under Treas. Reg. § 1.170A-1(g) uniformly "has involved taxpayers incurring unreimbursed expenses incident to the rendition of services to a charity by those same taxpayers" (82 T.C. at 938).[28]

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[27] See also Staff of the Joint Comm. on Taxation, 99th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1986*, at 59 (Joint Comm. Print 1987) (deduction available where "services provided by the taxpayer"); Staff of the Joint Comm. on Taxation, 98th Cong., 2d Sess., *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, at 1133 (Joint Comm. Print 1984) (deductible out-of-pocket expenses are those "incurred by a taxpayer in rendering services").

[28] Petitioners cite (Br. 36) three cases to support their contention that "unreimbursed expenses" may be deducted by a person other than the one who

Thus, to the extent (if any) that the expenses incurred by petitioners' sons in performing their missionary services for the Church may be within the ambit of Treas. Reg. § 1.170A-1(g), they can be deducted only by the sons themselves, not by petitioners.[29] It is fundamental that, in the absence of a special pro-

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renders the services to the charity, *Smith* v. *Commissioner*, 60 T.C. 988, 994 (1973); *McCollum* v. *Commissioner*, 37 T.C.M. (CCH) 1817 (1978); and *Rockefeller* v. *Commisioner*, *supra*. None of these cases stands for this proposition. In both *Smith* and *McCollum*, the parents themselves contributed services and were assisted by their young children. Hence, most of the expenses were incurred by the taxpayers incident to services that they themselves rendered; it does not appear in either case that the court's attention was called to the fact that a small portion of the expenses was attributable to persons other than the taxpayers. See *Smith*, 60 T.C. at 990-991; *McCollum*, 37 T.C.M. (CCH) at 1818-1819; see generally *Brinley* v. *Commissioner*, 782 F.2d at 1338 n.5 (Hill, J., dissenting). In *Rockefeller*, the issue was whether the deductions were "to" or "for the use of" the charity, which affected whether the taxpayers qualified under then-existing provisions for unlimited charitable deductions; the court held that the deductions were "to" the charity. The court therefore had no occasion to construe Treas. Reg. § 1.170A-1(g). The taxpayers' philanthropic activities in *Rockefeller* included the provision of services to various charitable organizations; in connection with rendering these services, the taxpayers employed others to assist them, and claimed a deduction under the regulation for the salaries and expenses of those employees. In contrast to this case, it was the Rockefellers themselves who contributed services to charity, and the deductions related to payments made by them incident to rendering those services. Thus, none of the three cases cited by petitioners considered or discussed the issue presented here. See Note, *supra*, 83 Mich. L. Rev. at 1438 n.58 ("[T]he decision in *Rockefeller* has no precedential value for the question of whether money paid by a taxpayer to reimburse another person's expenses is deductible, because that issue was not before the court.").

[29] It is questionable whether most of the expenses in this case could be deducted by the missionaries. The expenses claimed here were almost entirely for meals and lodging, which are deductible under the regulation only if incurred "away from home." In *Brinley*, the court of appeals held that the meals and lodging expenses of the missionaries there were not deductible under the regulation because their tax home was where they served on their mission, if it lasted for more than the one year that the IRS generally regards as the outside limit of a temporary stay. See 782 F.2d at 1333-1334. Moreover, even during a

vision to the contrary (such as one permitting joint returns), individual members of a family are separate taxpayers, each with his own income and deductions. See I.R.C. § 7701(a)(14); Treas. Reg. § 1.6012-1(a)(4). Petitioners' interpretation of the regulation would permit the unreimbersed expense deductions (if any) to be shifted from the sons to the parents—who can obtain a greater tax advantage from the deductions because they are in a higher income tax bracket. Any such assignment or shifting of deductions has long been rejected by this Court. See *Magruder* v. *Supplee*, 316 U.S. 394, 396 (1942) (taxes deductible only by person upon whom they are imposed); *Deputy* v. *du Pont*, 308 U.S. at 493-494 (stockholder's payment of corporation's obligation not deductible as business expense). Thus, whatever deductions might have been claimed by Benjamin and Cecil for the expenses incurred during their missionary service, petitioners cannot themselves qualify for deductions generated by their sons' service to the Church and attendant expenditures. See Note, *Charitable Deductions for Missionary Support: Conflict Between* White *and* Brinley, 5 Va. Tax Rev. at 219-220.

Apart from the problem of deduction shifting, the court below correctly noted (see Pet. App. 10a-11a) that petitioners' interpretation of Treas. Reg. § 1.170A-1(g) would provide an opportunity for forms of "taxpayer abuses" that would impose a

"temporary" business stay, the deductibility of meals and lodging expenses depends upon having a regular, or permanent tax home (*i.e.*, business headquarters) elsewhere. See *Peurifoy* v. *Commissioner*, 358 U.S. 59 (1958); *Commissioner* v. *Flowers*, 326 U.S. 465 (1946). Petitioners seek to avoid the holding in *Brinley* by asserting that, even though their missions lasted for more than one year, the missionaries here did not live in the same location for a year at a time and therefore their parents' home in Idaho should still be viewed as their tax home. But the "away from home" limitation cannot be avoided by changing one's residence every six months, especially if one lives in the same general area. If a taxpayer has neither a principal place of business nor a permanent residence, the courts have held that he has no tax home, *i.e.*, he carries his home on his back for tax purposes and cannot deduct the cost of meals and lodging as if he were always "away from home." See, *e.g.*, *Brandl* v. *Commissioner*, 513 F.2d 697, 699 (6th Cir. 1975); *Rosenspan* v. *United States*, 438 F.2d 905, 912 (2d Cir.), cert. denied, 404 U.S. 864 (1971); *James* v. *United States*, 308 F.2d 204, 207-208 (9th Cir. 1962).

"significant [enforcement] burden" on the IRS (Pet. App. 10a). There would be risk of a double deduction for a single expenditure if the parents could claim a deduction for their payments and the missionary child who actually incurs the expenses (and therefore is entitled to any applicable deduction under the plain meaning of the regulation) also claims them as deductible. Moreover, petitioners' interpretation would afford an opportunity for taxpayers to "anticipate" deductions, *i.e.*, shift them into earlier years, by having the parent make support payments to the child in a tax year preceding the actual expenditure of the funds. And examination of the validity of a taxpayer's claimed deductions under this theory would necessarily entail an intrusive inquiry into the records of a third party; only by examining the expenditures of the child could the IRS determine whether the parents' payments were applied to expenses that fall within the ambit of the regulation. See also *Brinley* v. *Commissioner*, 782 F.2d at 1337-1338 (Hill, J. dissenting); Note, *supra*, 83 Mich. L. Rev. at 1434-1435.

For all these reasons, the court of appeals correctly concluded that Treas. Reg. § 1.170A-1(g) provides no basis for a tax deduction claim by parents for funds that they transfer to their children to be used for living expenses.[30]

[30] Indeed, even if the regulation authorized a deduction for a taxpayer other than the individual rendering the services to the charity, petitioners would not satisfy the "primary benefit" prerequisite to such a deduction. The courts below did not have occasion to pass on the question, but the circumstances here do not indicate that the payments in question primarily benefitted the Church. The missionaries, of course, incurred these expenses for personal sustenance, and petitioners, by making these payments, received assurance that their children would be housed and fed. Thus, the payments here are of the sort that petitioners might well have made even for non-charitable reasons (see *Orr* v. *United States*, 343 F.2d at 557); indeed, the record shows that petitioners were supporting at least one of their sons before he was a missionary (J.A. 15-16), and they claimed both as dependents on their original return (Pet. App. 18a, 45a). Although the Church received some indirect benefit from petitioners' support of their children, the principal beneficiaries of the payments were individuals, and hence the unreimbursed expenses in question should not give rise to a deduction under Treas. Reg. § 1.170A-1(g). But see *White* v. *United States*, 725 F.2d at 1272 (finding on similar facts that Church was primary beneficiary of parents' payments to support their children).

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

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APPENDIX

26 U.S.C. 170 provides in pertinent part:

(a) *Allowance of Deduction.* –

(1) *General rule.* – There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowed as a deduction only if verified under regulations prescribed by the Secretary.

* * * * *

(c) *Charitable Contribution Defined.* – For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of –

(1) A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.

(2) A corporation, trust, or community chest, fund, or foundation –

(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;

(C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and

(D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

* * * * *

The Treasury Regulations on Income Tax (1954 Code) provide in pertinent part:

§ 1.170A-1 *Charitable, etc., contributions and gifts; allowance of deduction.*

(g) Contributions of services. No deduction is allowable under section 170 for a contribution of services. However, unreimbursed expenditures made incident to the rendition of services to an organization contributions to which are deductible may constitute a deductible contribution. For example, the cost of a uniform without general utility which is required to be worn in performing donated services is deductible. Similarly, out-of-pocket transportation expenses necessarily incurred in performing donated services are deductible. Reasonable expenditures for meals and lodging necessarily incurred while away from home in the course of performing donated services also are deductible. For the purposes of this paragraph, the phrase "while away from home" has the same meaning as that phrase is used for purposes of section 162 and the regulations thereunder.

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OCTOBER TERM, 1989

HAROLD DAVIS AND ENID DAVIS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONERS

The Government does not seriously dispute that Section 170, like other tax provisions dealing with charitable contributions, must be construed liberally in favor of the taxpayer. Pet. Br. 14 (citing, *inter alia*, *Helvering* v. *Bliss*, 293 U.S. 144, 151 (1934)). The Government counters merely by citing a wholly irrelevant decision, which stands for the unremarkable proposition that *non*-charitable deductions are to be construed narrowly. See Govt. Br. 32 n.21 (citing *Commissioner* v. *National Alfalfa Dehy. & Milling Co.*, 417 U.S. 134, 149 (1974)).[1]

On the issue of how to interpret the precise language of Section 170, the Government's brief is a masterpiece of studied evasion and obfuscation. What appears to be the Government's principal argument—its "earmarking" analysis—assumes that the Church's missionary program is some kind of religious "study abroad" curriculum designed primarily for the benefit of the missionaries rather than the Church's proselyting efforts. That assumption, as well as the corollary assumption that petitioners' principal motive must have been to benefit their sons rather than the Church, is contradicted by extensive and un-

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[1] The Sixth Circuit explained these two lines of authority in *Weingarden* v. *Commissioner*, 825 F.2d 1027, 1029 (6th Cir. 1987):

> The general canon of construction is that statutes imposing a tax are interpreted liberally (in favor of the taxpayer). [citations omitted] But provisions granting a deduction or exemption are matters of legislative "grace" and are construed strictly (in favor of the government). [citations omitted] A special rule applies to charitable deductions, however, because these provisions are an expression of "public policy" rather than legislative grace. [citing *Helvering* v. *Bliss, supra*]. Provisions regarding charitable deductions should therefore be liberally construed in favor of the taxpayer.

Accord *Hartwick College* v. *United States*, 801 F.2d 608, 615 (2d Cir. 1986); *C.R. Mueller Co.* v. *Commissioner*, 190 F.2d 120, 122 (3d Cir. 1951); *Harrison* v. *Barker Annuity Fund*, 90 F.2d 286, 288 (7th Cir. 1937); *American Inst. for Economic Research* v. *United States*, 302 F.2d 934, 937 (Ct.Cl. 1962), *cert. denied*, 372 U.S. 976 (1963). No doubt for this reason, the Government claims no deference for its interpretation of Section 170.

disputed evidence, which, given the procedural posture of the case, must be read in the light most favorable to petitioners. At bottom, the Government's analysis merely begs the fundamental question whether petitioners' contributions are "for the use of" or "to" the Church.

In arguing that petitioners' contributions are not "for the use of" the Church, the Government attempts to rewrite the court of appeals' decision, disavowing the very legal theory that the Government itself successfully pressed in the courts below. The Government then attempts to sustain the court of appeals' judgment on two alternative grounds, one of which rests upon a novel and plainly erroneous reading of the statutory language, and the other of which conveniently ignores both the procedural posture of the case and the fact that the courts below applied what the Government now concedes was an improper legal standard.

The Government's argument that petitioners' contributions are not "to" the Church is similarly flawed. The Government's response to petitioners' "agency" theory assumes that Section 170 requires a deduction to be both "to" *and* "for the use of" a qualified charity, contrary to the statutory language. And its response to petitioners' argument under Treasury Regulation § 1.170A-1(g) rests upon a claim of "deference" to an interpretation of the regulation that, to petitioners' knowledge, has never been formally articulated by the Internal Revenue Service in this or any other case.

Finally, the Government's concerns about the administrative burden resulting from a decision in petitioners' favor are grossly overstated and, in any event, cannot properly limit the scope of Section 170.

A. The Government's "Earmarking" And "Indefiniteness" Arguments Are Irrelevant.

In this Court, the Government relies primarily upon an argument that has no basis in the language of Section 170. Citing the "indefinite beneficiaries" concept articulated in *Russell* v. *Allen*, 107 U.S. 163, 167 (1882), and a line of "earmarking" decisions by the lower courts, the Government claims (contrary to the implications of both opinions below, see Pet. App. 9a, 23a-24a) that no deduction would be allowed for petitioners' payments even if they were made directly to the Church but "earmarked" for petitioners' sons. Govt. Br. 13-14, 17-21. According to the Government, "it logically follows, *a fortiori*, that payments made *directly to an individual* cannot be deducted as 'to or for the use of' " the Church. Govt. Br. 19 (emphasis in original); see also Govt. Br. 36-37.

1. The Government's reliance upon the "indefinite beneficiaries" concept necessarily and incorrectly assumes that the missionaries are the beneficiaries of the Church's missionary program, and hence, of petitioners' donations. Thus, for example, the Government makes the wholly unsupported and astounding assertion (Govt. Br. 43 n.30) that, "[a]lthough the Church received some indirect benefit" from the payments at issue here, "the principal beneficiaries of the payments were individuals."

That assumption, which pervades the Government's entire argument, is flatly contrary to the evidence, which must be read in the light most favorable to petitioners. See Pet. Br. 29 n.15. That unchallenged evidence shows that the purpose of the Church's missionary program is to teach the doctrines of the Church to those who are not members of the Church. Indeed, that is why missionaries are expected to spend at least 10 hours per day in proselyting activities. See Pet. Br. 30a (affidavit of Elder Robert L. Backman); Brief of The Church of Jesus Christ of Latter-day Saints as *Amicus Curiae* at 7. The beneficiaries of that program are therefore not the missionaries, but the Church itself and the non-Church members the missionaries teach.[2] The benefi-

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[2] See, *e.g.*, J.A. at 5 ¶ 6 ("payments directly and primarily furthered and served the aims" of the Church); J.A. at 11 ¶ 10 ("Plaintiffs' primary motivation was to assist the Church's missionary program"); J.A. at 13 ¶ 19 (money received by missionary

ciaries of a missionary's support payments are also "indefinite" because neither the Church, the donor, nor the missionary knows which individuals will be taught from one day to the next, much less when the payments are made.

For these reasons, this case is fundamentally different from cases in which a taxpayer seeks to provide a benefit directly to someone who is already receiving services or other assistance from a qualified charity, *i.e.*, someone who is the direct and intended beneficiary of the organization's charitable work. See, *e.g.*, *Tripp* v. *Commissioner*, 337 F.2d 432, 436 (7th Cir. 1964) (university student); *Thomason* v. *Commissioner*, 2 T.C. 441, 443-45 (1943) (orphan). Here, by contrast, the Church's missionaries are *instruments* of the Church in rendering services to third parties; contributions like those at issue here merely enable the missionaries to render those services. See, *e.g.*, *Winn* v. *Commissioner*, 595 F.2d 1060 (5th Cir. 1979) (contribution deductible even though made to Presbyterian missionary's father to deposit in missionary's account); *Peace* v. *Commissioner*, 43 T.C. 1, 7-8 (1964) (contributions deductible even though earmarked for particular Presbyterian missionaries); *Lesslie* v. *Commissioner*, 36 T.C.M. (CCH) 495, 496 (1977) (contribution

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"should be spent wisely and only for missionary work"); J.A. at 16 ¶ 17 ("My Primary and overriding motive for serving on the mission was to provide services to my Church in accordance with my religious beliefs"); see also Brief of *Amicus Curiae* at 10-11.

To be sure, missionaries receive many of the incidental benefits realized by those who devote themselves to any selfless endeavor—character development, joy of service, and, in the case of missionaries, increased faith. But those benefits do not make the missionary the legal "beneficiary" of the Church's missionary service any more than the satisfaction received by the donor of a charitable gift makes the donor the beneficiary of his own gift. See, *e.g.*, 2 B. Bittker, *Federal Taxation of Income, Estates and Gifts* 35-10 (2d ed. 1990) ("the satisfaction of fostering a worthy cause . . . is not the kind of quid pro quo that disqualifies [a] contribution under § 170"); *McCollum* v. *Commissioner*, 37 T.C.M. (CCH) 1817, 1821 (1978).

deductible even though made directly to named missionary).

2. The corollary of the Government's assumption about the nature of the Church's missionary program is that petitioners' motive in making their contributions was to benefit their sons rather than the Church. Thus, the Government suggests that petitioners' contributions are analogous to sham "scholarships" that are designated *at the insistence of the donor* for a particular student, and for which the obvious motive is to benefit a particular individual rather than the charitable work of a qualified organization. See, *e.g.*, Govt. Br. 18, 36.

The Government's attack on petitioner's motive is rebutted by the undisputed evidence. As explained in their opening brief (Pet. Br. 34-35), petitioners testified that their motive was "a sincere religious desire to . . . support the Church's missionary program." Pet. App. 36a. Thus, their donations were "transferred to the missionaries because they were in fact missionaries (as opposed to being merely [petitioners'] sons)" (*id.*); the funds were "not intended for the sons to use as they might see fit" (*id.*); and petitioners "would not have provided the money to" their sons if "the sons had not been missionaries or if they had not agreed to use the money in accordance with Church instructions." Pet. App. 36a-37a. Most important, and unlike the "scholarship" examples cited by the government, petitioners sent their contributions directly to their sons rather than to the Church because the Church, for its own religious reasons, asked them to do so. See Pet. App. 2a, 31a-32a, 36a; see also Brief of *Amicus Curiae* at 5, 12-13.[3]

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[3] This fact distinguishes this case from most cases in which a taxpayer seeks to provide support for someone who is arguably an instrument in the organization's charitable work, such as a university professor or an officer of a charitable foundation. Cf. Govt. Br. 21 n.14. It is very rare that such an organization will have any legitimate reason for requesting that contributions be sent directly to—

3. At bottom, the Government's "earmarking" analysis is a "red herring" that sheds no light on the deductibility of petitioners' contributions. *First*, the premise of the Government's entire argument—that a *gift* must be given to an "indefinite" beneficiary to be considered "to or for the use of" a qualified donee—is plainly erroneous. That crucial premise rests entirely upon a play on words: The Government begins by correctly observing (Govt. Br. 13-14) that an *organization* must benefit an indefinite group of beneficiaries to be a qualified "public charity" under common law principles and, therefore, under Section 501 of the Code. *E.g.*, *Russell* v. *Allen*, 107 U.S. 163, 167 (1882) (*charitable trust* must be "for the benefit of an indefinite number of persons"); see also *Bob Jones University* v. *United States*, 461 U.S. 574, 585-92 (1983) (discussing common-law roots of Section 501). But the Government then twists that language to argue that any *act* of "public charity" by an individual (see Govt. Br. 14, 20) also must benefit an indefinite group of beneficiaries to be "to" or "for the use of" the qualified organization under Section 170. There is nothing to support that argument.

Second, the government's reliance on what it refers to as the "earmarking cases" (Govt. Br. 17, 19), merely begs the question whether petitioners' payments were

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or earmarked for—its employees, and that such an arrangement can therefore be said to be "for the use of" the organization.

The Government also uses its "earmarking" argument as a vehicle for suggesting that deduction of petitioners' contributions is somehow improper because those contributions were used primarily to pay for "food, shelter, and transportation" (Govt. Br. 21), which are considered nondeductible "personal or living expenses" under I.R.C. § 262. But the regulations under Section 262 expressly exempt from the general rule of non-deductibility any expenses, including personal and living expenses, that are deductible under Section 170. Treas. Reg. § 1.262-1. Indeed, the Government acknowledges (Govt. Br. at 21 n.14) that a contribution used to pay such expenses would be deductible if the contribution were made, without earmarking, to the Church in the first instance. The allegedly "personal" nature of the expenses covered by petitioners' contributions is therefore irrelevant.

either "to" or "for the use of" the Church. In fact, the Government draws upon two distinct lines of authority, neither of which is properly grounded in the broad "indefiniteness" concept the Government advances. Decisions denying a deduction for earmarked donations placed in the possession of a qualified charity—the true "earmarking" cases—are actually based upon a sham rationale: In those cases, the qualified charity is merely being used as a "conduit" for channelling gifts to some third party. The individual, not the charity, is the object of the gift. The gift, therefore, cannot properly be said to be made "to" the charity within the meaning of Section 170. *E.g.*, *Tripp* v. *Commissioner*, 337 F.2d 432, 436 (7th Cir. 1964) (scholarship payments actually a "contribution to an individual" rather than to charity); cf. *Peace* v. *Commissioner*, 43 T.C. 1, 7-8 (1964) (contributions earmarked for particular missionaries "to" Church rather than missionaries). On the other hand, decisions denying a deduction for payments placed in the possession of someone other than the qualified donee (which involve no earmarking) do so on the ground that the gifts are in reality "for the use of" someone other than the qualified charity. *E.g.*, *Thomason* v. *Commissioner*, 2 T.C. 441, 443-45 (1943) (payments for use of orphan, not orphanage); *Davenport* v. *Commissioner*, 34 T.C.M. (CCH) 1585, 1588 (1975) (rent payments "for the use of" taxpayer's son, not church). But, as the Government grudgingly recognizes (Govt. Br. 18-21), both lines of authority—including administrative decisions by the IRS—uniformly *permit* the deduction of contributions earmarked for or sent directly to a third party, as long as the contribution benefits the charity and the charity has sufficient control over the use of the donated funds that the contribution can reasonably be said to be either "to" or "for the use of" the organization rather than the individual.[4]

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[4] *E.g.*, *Winn* v. *Commissioner*, 595 F.2d 1060, 1065 (5th Cir. 1979) (contributions earmarked for single missionary); *Peace* v. *Commissioner*, *supra*, 43 T.C. at 7-8 (contributions earmarked for particular missionaries); *Brinley* v. *Commissioner*, 782 F.2d 1326,

The Government's "earmarking" analysis thus ends where it begins, with the question whether the contributions at issue here are "to" *or* "for the use of" the Church.[5] Except to the extent it shows that the Church must benefit from and have some degree of control over those contributions (which it unquestionably does), the Government's analysis sheds no light on the answers to those fundamental questions.

B. The Court Of Appeals Erroneously Held That Petitioners' Contributions Are Not "For The Use Of" The Church As A Matter Of Law.

1. Petitioners previously established (Pet. Br. 16-23) that the courts below were in error in holding that a charity must acquire possession of a contribution made "for the use of" rather than "to" the charity. The Government now concedes that actual possession by a qualified charity is not required. It acknowledges (Govt. Br.

1331 (5th Cir. 1986) (payment directly to individual Mormon missionary); *Bauer* v. *United States*, 449 F. Supp. 755, 759 (W.D. La. 1978), *aff'd*, 594 F.2d 44 (5th Cir. 1979) (scholarship funds given to individual students); Rev. Rul. 70-519, 1970-2 C.B. 62 (contributions earmarked for specific boy in "big brother" program); Rev. Rul. 69-473, 1962-2 C.B. 37 (contribution directly to specific unwed mother); Rev. Rul. 66-10, 1966-1 C.B. 47 (contribution directly to specific disaster victim).

On several occasions, the Government has attempted to convince the courts to adopt a rule of *per se* non-deductibility for *all* earmarked donations, but every such attempt has been rebuffed. *E.g.*, *Peace* v. *Commissioner*, 43 T.C. 1, 7-8 (1964) (rejecting IRS argument that contributions earmarked for certain missionaries nondeductible merely because they were made for the support of "certain specified individuals").

[5] The Government's earmarking analysis plainly does not support the legal theory on which the Ninth Circuit granted summary judgment, *i.e.*, that possession is a necessary condition of deductibility under Section 170, even when the taxpayer is claiming a deduction for a payment made "for the use of" rather than "to" the charity. Indeed, the Government now disclaims that theory. See Govt. Br. 30 n.20; *infra* pp. 9-10. The cases on which the Government relies do establish that possession is not always sufficient, but they provide no support for the notion that possession is always necessary.

30 & n.20) that it is "apparent from the face of the statute . . . that Section 170 covers some transfers that are not made directly 'to' the actual possession of a qualified donee." However, the Government argues (*id.* n.20) that "the court of appeals never formulated" a contrary holding, and that petitioners have merely "demolish[ed] a straw man." The Government's argument not only distorts the decisions below, but also ignores the Government's own prior position in this and other cases.

Before the district court, the Government argued that the court should apply "an objective control test; viz., whether or not the qualified donee had full control of the payments." United States Memorandum Supporting Its Motion For Summary Judgment at 6 (D. Id. Mar. 27, 1987). According to the Government, "th[is] full control test provides objective assurance that the payments will be used for the intended charitable purpose because the charity *receives and controls* the funds." *Id.* at 7 (emphasis added). The Government had previously, but unsuccessfully, advanced this very theory before the Fifth Circuit in *Brinley* v. *Commissioner*, 782 F.2d 1326, 1331 (5th Cir. 1986).

The district court adopted the Government's theory. It held that the Government's "full control test" is the proper standard for determining whether a payment is "for the use of" a qualified donee, and that this test is satisfied only when "the charity has *sufficient possession* of the contribution so that it has discretion as to the use to which the donated funds will be put." Pet. App. 24a (emphasis added). In short, the district court held that possession is a necessary but not a sufficient condition for deductibility.

Before the court of appeals, the Government again pressed the "full control test" it had successfully advanced in the district court. Brief for the Appellee at 21 (9th Cir. Feb. 4, 1988). Under that test, according to the Government, "[i]t is controlling that the LDS Church never took *possession* of the funds in question,

and thus had no opportunity to exercise discretion as to whom they would be provided to or how they would be spent." *Id.* at 40 (emphasis added). The court of appeals also adopted the Government's theory, holding that no deduction is available when "the charity never *possesses* the funds, let alone controls their use. . . ." Pet. App. 9a (emphasis added); see also Pet. App. 15a (Section 170 "does not provide for a deduction by a taxpayer who does not . . . make a contribution directly to the charity").

It is thus clear beyond argument that the basis on which the district court granted summary judgment—and the basis on which the court of appeals affirmed that judgment—was the Government's own theory that possession by the Church is a necessary (although not a sufficient) condition for a contribution to be "for the use of" the Church. Because the Government now concedes that this theory is incorrect, petitioners are entitled, at a minimum, to a reversal and remand for application of the proper legal standard.

2. Petitioners previously proposed two alternative standards, each of which is consistent with the language, structure and legislative history of Section 170: First, because "for the use of" is a term of art denoting any arrangement in which one person conveys money or property to a fiduciary to hold or employ for the benefit of a third person (see Pet. Br. 17-20), a taxpayer need establish only that he gave a contribution to someone in a fiduciary capacity for the benefit of a qualified charity (*id.* at 11, 24).[6] Second, "for the use of" could be read,

[6] The Government repeatedly mischaracterizes petitioners' fiduciary standard by suggesting that petitioners read "for the use of" as "authorizing deductions for all payments to individuals that might incidentally benefit qualifying organizations." Govt. Br. 8; see also Govt. Br. 7, 29-32, 35. The "hypotheticals" discussed by the Government (Govt. Br. 30-32, 34)—as well as the Government's bluster about the catastrophic effects of a decision in petitioners' favor (Govt. Br. 10, 15-16, 42-43)—all rest upon the Government's mischaracterization of petitioners' proposal. Under petitioners' theory, however, no deduction could be taken in any of the Government's hypotheticals unless the taxpayer could establish that a fiduciary relationship existed and that the qualified organization was the principal, intended beneficiary of that relationship. See, *e.g.*, Pet. Br. 24.

as the Fifth Circuit did in *Brinley* v. *Commissioner*, 782 F.2d 1326 (5th Cir. 1986), to imply a "purposive control" standard, *i.e.*, a requirement that the charity have sufficient control to ensure, as a practical matter, that the contribution will serve primarily the charity's own purposes rather than benefit primarily the donor or some other party. Pet. Br. 11, 23, 25-27; Note, *Earmarked Charitable Contributions: In Search of a Standard*, 50 Mo. L. Rev. 918, 927-29 (1985); Note, *A Tax Deduction For Direct Charitable Transfers: The Case Against Davis* v. *United States, 861 F.2d 558 (9th Cir. 1988)*, 64 Wash. L. Rev. 935, 946-50 (1989).

The Government rejects both of these interpretations. The Government first contends (Govt. Br. 27-29) that "for the use of" means "in trust for." But the Government apparently recognizes that petitioners have presented sufficient evidence to create, at a minimum, a triable issue of fact on the question whether petitioners' missionary sons received petitioners' contributions in trust for the Church. See Pet. Br. 29 n.14.[7] Thus, the Government adopts an even more restrictive reading of the statutory language. It argues that, because the direct impetus for adding the words "for the use of" to Section 170 came from institutional trusts that (according to the Government) merely held funds "for eventual distribution

[7] The affidavit of petitioner Harold Davis, among other evidence, establishes (a) the existence of a trust *res*, *i.e.*, petitioners' contributions; (b) that the Church was the intended beneficiary of petitioners' payments; and (c) an expression by the petitioners that their contributions were to be held for the benefit of the Church—all of the elements of a trust. Pet. Br. 28-29 & n.14. That affidavit as well as other undisputed evidence also establishes that petitioners' sons accepted their fiduciary obligations. See J.A. at 13 n.20 ("[t]he missionaries had made a commitment with [petitioners] to use the money for which a deduction is claimed only in accordance with the Church's instructions"); see also *supra* note 2.

to a qualifying charity" (Govt. Br. 29), a contribution satisfies the statutory requirement only when it is made to an institutional, "intermediary" trust. See Govt. Br. 11, 27. This interpretation is incorrect for three reasons:

First, it finds no support in the plain language of the statute. Petitioners have already demonstrated that the phrase "for the use of," as a legal term of art, is broader than "in trust for." Pet. Br. 17-20. The Government does not seriously dispute that analysis or offer any evidence to the contrary.[8] If Congress had meant "in trust for," it could easily have used those very words. And if it had meant to limit the statute further to institutional, "intermediary" trusts (Govt. Br. 28) (which are commonly called "passive trusts," see G. Bogert, *The Law of Trusts and Trustees*, § 207 at 43-44 (rev. 2d ed. 1984), it could easily have said that as well. Moreover, even if the impetus for amending Section 170 had come only from institutional "intermediary" trusts, that would be no basis for limiting the reach of the statute in the manner suggested by the Government. Decisions of this Court clearly establish that a statute is not to be limited to the particular problem that gave rise to it if its language extends beyond that problem.[9]

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[8] The Government's interpretation of "for the use of" relies upon a definition of the *verb* "to use" rather than the *noun* "use." Rather than citing the primary synonyms for the noun "use"—*i.e.*, "service," "advantage," "profit" and "account,"—the Government erroneously relies upon the primary synonyms of the verb "use"—*i.e.*, "employ" and "utilize." Govt. Br. 25. Moreover, the very dictionary cited by the Government also defines "use" as "the *benefit* in law of one or more persons." *Webster's Third New International Dictionary* 2523 (1986) (emphasis added). See Pet. Br. 23-24.

[9] See, *e.g.*, *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287-89 (1976) (42 U.S.C. § 1981, though enacted "for further relief of the constitutionally emancipated former Negro slaves," applies in discrimination claim filed by white employees because statutory language prohibits discrimination against "all persons"); *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 109 S.Ct. 2893, 2903-04 (1989) (although "[o]rganized crime was without a doubt Congress' major target" in enacting RICO, Court could not "accept this argument for a narrowing construction of the Act's expansive terms"); *Sutherland Stat. Const.* § 49.02 at 348 (4th ed. 1984) (" 'It is a general rule in the construction of statutes that legislative enactments in general and comprehensive terms . . . apply to persons, subjects and businesses within their general purview and scope . . . where the language fairly includes them,' " quoting *Cain* v. *Bowlby*, 114 F.2d 519, 522 (10th Cir.), *cert. denied*, 311 U.S. 710 (1940)).

Second, the historical assumption underlying the Government's position—*i.e.*, that the particular problem Congress was attempting to solve in adding "for the use of" to Section 170 was limited to institutional, "intermediary" trusts—is belied by the very legislative history cited by the Government. The Government relies heavily upon a passage in the Senate testimony of William Greenough, a representative of the New York Community Trust. Govt. Br. 26 & n.18. Yet, the Government selectively omits portions of that testimony which show that Congress was concerned with the impact of the pre-existing law on institutional *and* individual trustees, and that it understood the new statutory language to include both.[10]

Third, the government's interpretation of "for the use of" is completely at odds with long-standing judicial and administrative interpretations. Numerous courts have

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[10] The portions of Mr. Greenough's testimony excised by the Government are underlined:

> Our whole request here is that the sections of the income tax be made harmonious with this provision [of the estate tax allowing deductions for gifts to trustees in trust for qualified donees]. There seems to be no reason in the nature of things, if a gift to a corporation organized exclusively for religious, charitable, scientific, and these other related purposes should be exempt from the estate tax, why a gift to trustees, either *individually* or corporate, for precisely similar purposes should not also be exempt. That in itself is absolutely all we are asking for . . . ; that is to say, where a donor during his life time wants to make a charitable gift either to an *individual* who is trustee for some charitable purpose or to a trust company who is trustee for some charitable purpose, he may do so and the exemption will be allowed.

Hearings on H.R. 8245 Before the Senate Comm. on Finance, 67th Cong., 1st Sess. 530 (1921) (emphasis added).

permitted deduction of a contribution "for the use of" a charitable organization without requiring that the contribution be placed in the hands of an institutional or "intermediary" trustee, or indeed, any trustee at all.[11] The IRS itself for many years held that unreimbursed expenses directly attributable to the performance of voluntary services for a qualified donee were "for the use of" that donee (see Pet. Br. 22 & n.8), even though such contributions obviously are not made through any trustee, let alone an institutional or "intermediary" trustee. Indeed, the IRS Chief Counsel observed in a brief to the Tax Court as recently as 1981 that "[m]any payments other than payments to a trust are payments 'for the use of charity.'" Respondents' Brief in Answer, Tax Court No. 9356-77, at 14 (citing cases) (previously lodged in this Court). The Government cites no judicial or administrative decisions in support of its new interpretation of the statutory language.

3. The Government also appears to argue (Govt. Br. 32-35) that, even if "for the use of" is not limited to contributions made to institutional, "intermediary" trustees, petitioners have nonetheless failed to establish that the Church had sufficient control to justify a deduction. This argument is misplaced for at least two reasons:

First, the Government conveniently ignores the fact that the district court has not yet held a trial on the question of control. The Government, moreover, while apparently disagreeing with the control standard advanced by petitioners and applied by the Fifth Circuit in *Brinley*, studiously avoids articulating any theory or standard by which a court could determine the sufficiency of the Church's control. But unless (as the courts below incorrectly held) the Church must have control amounting to "posesssion of the contribution" (Pet. App. 24a), petitioners plainly have presented sufficient evidence to create a triable question of fact on the control issue under any plausible theory or standard. See Pet. Br. 6-8, 28-30 (summarizing evidence). The Government's repeated efforts to read the factual record in the light most favorable to its own position (Govt. Br. 2-6, 32-35) is improper at this stage of the litigation. Moreover, the Government's heavy reliance upon what it repeatedly and incorrectly characterizes as the lower courts' "findings" on the control question (see Govt. Br. 6, 7, 22, 23, 30, 33) is plainly misplaced,[12] particularly given the Government's concession that the courts below applied the wrong legal standard (see *supra* 9-10).

Second, the Government's arguments rest upon a mischaracterization of petitioners' control argument. Petitioners do not contend, as the Government implies (Govt. Br. 33-35) that the control requirement is satisfied if the Church possesses "front-end" *or* "back-end" control over the contributions. Like the Fifth Circuit in *Brinley*, petitioners contend that any control requirement implicit in the phrase "for the use of" is satisfied by substantial front-end *and* back-end control. The Church plainly has substantial front-end control, as evidenced by the fact that it requests the funds, specifies the amounts to be contributed, and, most important, controls the manner in which the funds are to be paid (*i.e.*, whether they are to be sent directly to the missionary or to the Church). See Pet. Br. 6-8, 30; *supra* at 5.[13] The Church also has substantial back-end control resulting from its extraordinary control over missionaries' day-to-day activities, its

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[11] *E.g.*, *Brinley* v. *Commissioner*, 782 F.2d 1326, 1331 (5th Cir. 1986); *Winn* v. *Commissioner*, 595 F.2d 1060, 1065 (5th Cir. 1979); *Bauer* v. *United States*, 449 F. Supp. 755, 758 (W.D. La. 1978), *aff'd*, 594 F.2d 44 (5th Cir. 1979); *SICO Found.* v. *United States*, 295 F.2d 924, 930 (Ct.Cl. 1961); *Archbold* v. *United States*, 444 F.2d 1120, 1122 (Ct.Cl. 1971); *Morey* v. *Riddell*, 205 F. Supp. 918, 921 (S.D. Cal. 1962).

[12] It is well established that the grant of summary judgment is in all respects subject to *de novo* review. 6 J. Moore, *Moore's Federal Practice* ¶ 56.27[1] at 56-852 (1988). See also Pet. Br. 29 n.15.

[13] The Church's front-end control is further enhanced by its selection and assignment of its missionaries, and by the clear understanding among all concerned that the missionary is to use the

financial guidelines, and its reporting requirements. See Pet. Br. 6-8, 30; Brief of *Amicus Curiae* at 6-7, 22-23.[14]

C. The Court Of Appeals Erroneously Held That Petitioners' Contributions Are Not "To" The Church As A Matter Of Law.

1. Petitioners previously demonstrated, based upon the evidence in the record, that missionaries are agents of the Church both for the purpose of teaching the Church's beliefs to those in the missionary's mission area (Pet. Br. 38-39), and for the limited purpose of accepting funds donated to support them in their missionary labors, up to the amounts specified by the Church (Pet. Br. 39-40). Because petitioners' donations were made to authorized agents of the Church, they were "to" the Church within the plain meaning of Section 170. Pet. Br. 38-42; see also Brief of *Amicus Curiae* at 6 n.11. Aside from its "earmarking" argument (see *supra* 3-8), the Government's only response is that, even if petitioners sons were agents of the Church duly authorized to accept the payments at issue, "[t]he question remains whether [those] payments[s] for their son's support [are] deductible as 'for the use of' the Church." Govt. Br. 37. But this argument is obviously contrary to the language of the statute because it assumes that any such donation must be "to *and* for the use of" the qualified donee, rather than "to *or* for the use of" the donee.[15]

2. Petitioners also demonstrated (Pet. Br. 30-37) that their donations are contributions "to" the Church because

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funds only to facilitate his or her missionary services on behalf of the Church. See Pet. Br. 3-4, 6-8.

[14] Like the decisions below, the Government's one-sided analysis of the evidence (Govt. Br. 34) simply ignores several of the most important sources of the Church's control over the contributions at issue, including the Church's control over the manner in which payments are made and its control over the missionaries' activities. See Pet. Br. 6-8, 40 & n.21.

[15] To be sure, a taxpayer seeking a deduction under an agency theory must demonstrate that the charitable organization has sufficient control to prevent the agency relationship from being a mere "sham." See *supra* 7. But it need not demonstrate the same level of control required for deduction of a donation made to a non-agent "for the use of" a charitable organization. See *supra* 14-16. Because petitioners have established sufficient control to satisfy the latter requirement, they have necessarily established sufficient control for a genuine agency relationship.

they are "unreimbursed expenditures" under Treasury Regulation § 1.170A-1(g). The Government's principal response—that Regulation (g) "permits a deduction only by the taxpayer who both incurs the expense and performs the service" (Govt. Br. 39)—is incorrect for two reasons:

First, as the Government acknowledges (Govt. Br. 39-40), the language of the regulation is not so limited. Indeed, its language stands in marked contrast to that of its predecessor, which was *expressly* limited to expenses incurred in connection with the taxpayer's own services. See Rev. Rul. 55-4, 1955-1 C.B. 291; Govt. Br. 40. The Government is thus reduced to arguing (Govt. Br. 39-40) that such a limitation is somehow implicit in the language of the present regulation. But the Government itself recognizes (Govt. Br. 40-41 n.28) that its position is contrary to numerous decisions of the courts of appeals and the Tax Court.[16] The Government also invokes the principle that a court should defer to "the Commissioner's interpretation of his own regulation." Govt. Br. 39. But the Government cites no revenue ruling or other deci-

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[16] Indeed, *Brinley* v. *Commissioner*, 782 F.2d 1326, 1332 (5th Cir. 1986) reversed a decision of the Tax Court on this very point. See also *White* v. *United States*, 725 F.2d 1269, 1271-72 (10th Cir. 1984); *Rockefeller* v. *Commissioner*, 676 F.2d 35 (2d Cir. 1982); *McCollum* v. *Commissioner*, 37 T.C.M. (CCH) 1817 (1978); *Smith* v. *Commissioner*, 60 T.C. 988 (1973). Although conceding that *Rockefeller*, *McCollum*, and *Smith* permitted a deduction for expenses incurred by non-taxpayers, the Government (Govt. Br. 41 n.28) argues that "it does not appear . . . that the court's attention was called" to that fact. But the failure of the Internal Revenue Service to raise the issue in those cases merely underscores the novelty of the interpretation advanced by the Government here.

sion—in this case or elsewhere—in which the Internal Revenue Service itself (as opposed to its counsel) has articulated the interpretation now advanced by the Government. See, *e.g.*, *SEC* v. *Chenery*, 318 U.S. 80 (1947).

Second, as the Tenth Circuit concluded in *White* v. *United States*, 725 F.2d 1269, 1271 (10th Cir. 1984), there is "no rational basis" for such a limitation. The benefit bestowed on the Church as a result of a missionary's service is the same whether that service is financed by the missionary himself or by someone else. See Pet. Br. 32-35; Brief of *Amicus Curiae* at 16. The Government, moreover, does not dispute that businesses are routinely permitted to take deductions for expenses incident to the rendition of services by third parties. See Pet. Br. 36 n.20. The Government's only policy justification for its proposed limitation on Regulation (g) is that petitioners' interpretation would permit "deductions . . . to be shifted from the sons to the parents." Govt. Br. 42. But this justification begs the very question at issue, *i.e.*, whether a taxpayer is entitled to deduct expenses incurred in connection with charitable services rendered by someone else. See Pet. Br. 37.[17]

[17] The Government's additional argument (Govt. Br. 43 n.30) that petitioners do not satisfy the "primary benefit" requirement is not only contradicted by substantial evidence in the record (see *supra* 3-6), which must be read in the light most favorable to petitioners, but is also contrary to every judicial decision that has addressed that question in the context of the Church's missionary program. See *White* v. *United States*, 725 F.2d at 1272; *Brinley* v. *Commissioner*, 782 F.2d at 1331-32, 1336. The Government's suggestion that the Church receives only an "indirect benefit" (Govt. Br. 43 n.30)—comparable to the benefit received by a university from the scholarly pursuits of its students (Govt. Br. 30-31)—is utterly absurd when considered in light of the undisputed fact (Pet. App. 43a) that missionaries typically spend between 50 and 70 hours per week actively proselyting on behalf of the Church.

D. The Government's Administrative Convenience Arguments Are Misplaced.

As previously discussed (*supra* note 7), the Government's general assertions about the administrative burden to the IRS of a decision in petitioners' favor (see Govt. Br. 10, 15-16, 42-43) rest upon a mischaracterization of petitioners' interpretation of the statutory phrase, "for the use of." And, as explained in petitioners' opening brief (Pet. Br. 42-43), the Government's specific assertions are utterly groundless.[18] In any event, those concerns are more properly addressed to Congress, which has expressly permitted a deduction for contributions made to third parties "for the use of" as well as "to" a qualified organization. The plain language of Section 170 cannot properly be narrowed solely to serve the administrative convenience of the IRS. See, *e.g.*, *Commissioner* v. *Duberstein*, 363 U.S. 278, 290 (1960).

In fact, any additional administrative burden created by a decision in petitioners' favor would be minimal. To determine the deductibility of any particular contribution, the IRS would merely need to verify (a) that the recipient was, in fact, a missionary during the relevant period, and (b) that the amount of the claimed deduction is within the Church's guidelines for that mission during that period. The taxpayer, of course, would have the burden of proof on both issues. Given the small amounts of money involved and the Church's own incentive to keep missionary expenses to a minimum (see Pet. Br.

[18] As previously noted (*supra* 18), the Government's "deduction shifting" argument (Govt. Br. 42) is wholly circular. See also Pet. Br. 43. And the Government's "double deduction" argument assumes (a) that the missionary, who spends virtually all of his or her time proselyting and is not allowed to work, will have sufficient outside income to need a charitable contribution deduction; and (b) that missionaries and their parents will be dishonest in their tax returns. The first assumption, however, is rarely satisfied in practice, and the second proves too much: the only way to avoid abuse arising from simple dishonesty would be to eliminate charitable deductions altogether. See also Pet. Br. 43.

6-7), there would be no need to examine the missionary's expenditures.[19] But, even if the IRS felt it necessary to examine those expenditures, that task would be no different from the auditing task it would face if the funds came from the Church itself. Given the uniqueness of the Church's missionary program, moreover, there is no realistic possibility that a favorable decision could lead to abuse by other taxpayers. In short, the additional administrative burden to the IRS of a decision in petitioners' favor is trivial by comparison to the substantial burden to the Church of an adverse ruling in this case. See Pet. Br. 45; Brief of *Amicus Curiae* at 20-22.

CONCLUSION

For the reasons stated above and in petitioners' opening brief, the judgment below should be reversed.

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March 12, 1990

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[19] There is no basis for the Government's apparent concern (Govt. Br. 33 n.22) that the Church might set the guidelines at abusively high levels, thereby permitting substantially larger deductions than those at issue here. The IRS could easily challenge any deduction in excess of basic food, lodging and transportation expenses as being "for the use of" the individual missionary rather than the Church. But the Government does not—and could not—contend that the amounts at issue here are in any way excessive.

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No. 89-98

(5)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

HAROLD and ENID DAVIS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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HIP

QUESTION PRESENTED

Whether taxpayers' donations sent directly to an ordained missionary acting under the church's control are deductible as charitable contributions under 26 U.S.C. § 170, where such donations are made at the request and under the direction of the missionary's church, in amounts specified by the church, and with the primary purpose and effect of benefitting the church's missionary effort.

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BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Church of Jesus Christ of Latter-day Saints ("Church"), is recognized by the Internal Revenue Service ("IRS") as an organization eligible to receive tax deductible charitable contributions under Section 170 of the Internal Revenue Code (26 U.S.C.). The Church conducts a world-wide missionary program with over 25,000 full-time unpaid missionaries from the United

States whose necessary expenses are paid generally by donations from their families, friends or other members. This system for financing missionary service was designed to meet the needs of the Church.

The Church has a strong interest in this case because the decision of the Ninth Circuit jeopardizes the charitable contribution tax deduction status of missionary donations being made monthly by members of the Church who are trying to advance the work of the Church. Nondeductibility would force the Church to choose between preserving the beneficial characteristics of its present program and sacrificing Church objectives to qualify the program for tax deductibility in the interest of its members.

The parties have consented to the filing of this brief.

STATEMENT OF THE CASE

As with all ordained missionaries of the Church, the Petitioners' ("Taxpayers") missionary sons were not self-appointed, and their missionary service experience was neither intended nor conducted for their personal benefit. Nor did the Church request Taxpayers to pay their donations directly to the missionaries for the personal benefit of the missionaries, but to accomplish important objectives of the Church. To comprehend to what extent the Church's missionary program, including its preferred method of payment, is oriented strictly toward Church benefit, one must appreciate the place of missionary work in the history and doctrines of the Church.

A. Establishment of the Church's Missionary Traditions

The very first missionary effort by the Church had a family connection. In June, 1830—when the Church had been organized only two months and had barely 50 members—Samuel Smith was appointed by his brother Joseph,

the President of the Church, to "take a missionary journey to the east." He travelled on foot up to 25 miles per day, relying on the hospitality of people he met, or else going without food and sleeping in fields beside the road. His assignment was to distribute copies of the newly-published BOOK OF MORMON [1] and to tell all who would listen of the miraculous restoration, through the Prophet Joseph Smith, of the Church of Jesus Christ.[2]

By October of that first year, the Church had called other missionaries, and assigned them to travel in various directions from its then headquarters in Fayette, New York. Four missionaries were assigned to preach to the American Indians on the western frontier.[3] Travelling mostly on foot in the cold and storms of fall and winter, they preached to Indian tribes in New York, Ohio and Missouri, and to the settlers along the way. The successes of these devoted missionaries opened the door for the Church's eventual move to Kirtland, Ohio.[4] In those early days of the Church, the missionaries included men of all ages, most of whom were married and left behind families. Yet, even then, faithful young men, such as the missionaries in this case, were sent out to perform this sacred service as evidenced by the call of Orson Pratt at the age of 19, in October, 1830.[5]

During the next six years, the Church sent missionaries into most of the eastern states and into parts of Canada,

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[1] The *Book of Mormon* is one of four books of scripture accepted by the Church. The others are the *Holy Bible, Doctrine and Covenants* and *Pearl of Great Price*.

[2] J. F. Smith, *Essentials In Church History* 103-4 (21st ed. 1966).

[3] *Doctrine and Covenants* §§ 28, 30-33 (1830).

[4] J. F. Smith, *Essentials In Church History* at 115-18.

[5] *Doctrine and Covenants* § 34 (1830).

but as yet had not begun to realize its prophetic command to teach the restored gospel "to all nations." [6] Then, in the summer of 1837, Joseph Smith called two of the Church's Twelve Apostles and five other men to leave their families and begin missionary work in Great Britain. They received no financial support from the Church itself, but instead relied upon what little money was donated by their families, new converts or others sympathetic to their service. For example, they had to delay sailing from New York City for two weeks until they received sufficient donations to pay the fare. Upon arriving in England, they continued to rely upon donations and the hospitality of friends and converts for all of their support.[7] The efforts of these missionaries, and of the

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[6] *Id.*, § 42:58 (1831). In the following additional revelations to the Prophet Joseph Smith, the commandment was reiterated:

> Send forth the elders of my church unto the nations which are a far off; unto the islands of the sea; send forth unto foreign lands; call upon all nations . . . .
>
> And this gospel shall be preached unto every nation, and kindred, and tongue and people. *Id.*, § 133:8, 37 (1831).
>
> For it shall come to pass in that day, that every man shall hear the fullness of the gospel in his own tongue, and in his own language, through those who are ordained unto this power, by the administration of the Comforter, shed forth upon them for the revelation of Jesus Christ. *Id.*, § 90:11 (1833).

See also, *Matthew* 24:14: "And this gospel of the kingdom shall be preached in all the world for a witness unto all nations; . . . ."

[7] J. F. Smith, *Essentials In Church History* at 200-203; 1 Millennial Star 12, 289-95 (Apr. 1841).

The following excerpt from an editorial by early Apostle, Parley P. Pratt described how the first missionaries to England, travelling "without purse or scrip," received their financial support:

> Now we would ask,—How shall their expenses be paid? In answer to this we would say that no man should be hired, and thus make preaching a trade. Secondly, No man should go before he is sent. Thirdly, He should not take thought to provide himself purse or scrip, or a quantity of clothing beforehand, so as to be at his own charges, but should go by faith in the promises of that God who sent him. It then becomes

nearly 600 others who were assigned to follow in their path, resulted in the Church's growing to nearly 17,000 members by 1840.[8]

These early missionaries set standards of service, sacrifice and frugality that remain the models for the Church's missionaries today, but it is no longer possible for the missionaries to travel without purse or scrip. Nevertheless, the Church's financing plan for its missionaries still stresses the concept of an unpaid ministry, living at the level of barest necessity, for three very important reasons: First, it reduces the financial burden on families and other contributors. Second, it fosters equality among missionaries whose families represent all levels of economic backgrounds. This equality in the mission field is critical because of the Church practice of requiring missionaries to live and work at all times in pairs (*i.e.*, with "companions").[9] Third, it minimizes distractions, thus increasing the productivity of the missionaries. The Church has found that there is an inverse relationship between a missionary's expenditures and the quality of his or her work. If a missionary spends money beyond

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> the people's duty to feed him, clothe him, entertain him kindly, to bear his expense from place to place, and to aid his family, if he has one, whose circumstances will not enable them to support themselves. 2 Millennial Star 8, 140 (Dec. 1841).

[8] *Deseret News 1989-1990 Church Almanac* 203 (1989).

[9] Since the early 1900's, the majority of the missionaries have been young, single men and women, whose finances were donated, for the most part, by their parents. In 1925, David A. Smith of the Presiding Bishopric stressed the importance of not sending the missionaries too much money, so that "the burden now placed upon many who are struggling to maintain missionaries, who are laboring with companions who have more than they need, will be greatly reduced, and a condition of equality will be more nearly brought about in the mission field." He pointed out that missionaries "who follow as nearly as possible this admonition, are doing the best work." Report of the 95th Annual Conference of The Church of Jesus Christ of Latter-day Saints 112-3 (Apr. 1925).

the necessities contemplated by the thresholds set by the Church (see Appendix A), his or her effectiveness in the work of the Church diminishes.[10]

In order to control missionary costs, the Church sets standards for the amount of money a missionary should need to spend in each mission. The president of each mission throughout the world regularly gathers and updates information as to costs for housing, food and transportation for the missionaries under his supervision. For example, as to housing, he either finds or supervises the finding of apartments for the missionaries to assure that the quarters are safe and clean, but appropriately economical. Frequently, the mission will sign the lease and pay the rent, assessing each missionary for a proportionate share. (This is sometimes necessary to preserve the lease in light of the frequent rotating of missionaries in and out of each area.) Each mission president is thus able to establish a standard for the costs required for a missionary to function in his mission. The missionary is required to report all expenses weekly to the mission president, as a form of agency accountability,[11] and as a means of constraining the missionary to live frugally within that standard.

The mission president reports this expense standard at least monthly to Church headquarters. The Church compiles the reports from all of its 227 missions and constantly updates its master list of mission expense standards. This list is used to inform newly-called missionaries and their parents of the amount needed to fi-

[10] Affidavit of Robert L. Backman, ¶¶ 14, 17 and 21-22. Docket Entry 14; See also n. 9, *supra*.

[11] The Church authorizes its missionaries, as agents, to receive contributions for the support of the Church's missionary program. Letter from the Church's First Presidency (Oct. 13, 1978) (reproduced in Appendix B at 11a).

nance the missionaries' services. The list is also distributed quarterly to every congregation of the Church for the bishops (local ecclesiastical leaders) who have the responsibility to update parents, and to monitor and assist the financing of missionaries from their congregations. Parents and others who contribute are frequently reminded not to give more than the Church standard for the reasons stated above.

B. Nature of a Missionary's Work

Like the pioneer missionaries, today's missionaries face a rigorous schedule of work with essentially no time for personal pleasure, sight-seeing or relaxation. Benjamin and Cecil Davis, like all other missionaries of the Church, were expected to conform to a daily schedule of at least ten hours per day of contacting people about the Church, in addition to their time spent studying and preparing for that work. Benjamin's averages of 70 hours per week meeting and teaching people and ten hours per week in study and preparation were typical of missionaries throughout the Church.[12] Cecil's averages of 60 hours proselytizing and 15 to 25 hours in study and preparation

[12] Elder Gordon B. Hinckley, now First Counsellor in the Church's First Presidency, spoke of the rigors of the work in a sermon to the general membership in 1959:

> [T]here is nothing of a vacation, nothing of a holiday in this great missionary service. It is hard, and at times discouraging, work. Last year our missionaries averaged sixty-seven hours a week in actual proselytizing effort. Let those who contemplate missions realize that they will work as they have never worked before . . . . Report of the 129th Annual Conference of The Church of Jesus Christ of Latter-day Saints 120 (Apr. 1959).

Only individuals willing to accept the work obligations and other conduct limitations dictated by the Church are called to serve as missionaries. If a missionary, once called, fails to conform to the mission standards of conduct, the Church will impose appropriate discipline (including, if necessary, early termination of the appointment to serve).

were consistent with his assignment to the sparsely populated Cook Islands, where he was also required to learn a foreign language.

Missionaries in many parts of the world must also fill ecclesiastical positions within the congregations where they serve. All functions of the Church relating to worship and congregational administration are conducted by the lay membership, for there is no paid clergy in the Church at that level. Consequently, in areas where the Church membership is small and consists largely of recent converts, it is necessary for the missionaries to participate or even preside in the congregational leadership. Thus, missionaries are regularly called upon, not only to seek and teach new converts, but also to organize and conduct worship services, to provide pastoral counselling, to visit the sick and to perform other religious services for members. They are charged with training new members eventually to accept lay ecclesiastical leadership assignments. This labor requires time, patience, maturity and judgment. The Church reposes extraordinary confidence and responsibility in its young missionaries. They are, indeed, ministers of the Gospel.

C. Comparison wiht Other Church Contributions

The Church receives from its members various kinds of contributions. These include tithing (one-tenth of income),[13] fast offerings (monthly donations for the poor), and missionary contributions. All of these are given in the same spirit of willingness, at the request of the Church, solely to advance the religious and charitable purposes of the Church.[14] The latter category, missionary contributions, consists of two main kinds: (1) donations by parents to pay the costs of their child's missionary services, and (2) donations by other members to a Church-administered fund to pay the costs of services provided by missionaries whose parents are unable or unwilling to pay the full amount needed. Both are gifts for the support of the Church's missionary program. The Church believes that the donor of a child's costs of missionary service should receive the same tax treatment as the donor to a Church fund whose money will be sent to a missionary unknown to the donor—perhaps the companion of the first donor's son or daughter. Each donor has made an identical contribution to advance the Church's program and interests. Neither donor contributes in order to benefit the missionary; both donors give to enable a missionary to render vital services to the Church. In the hands of the two missionary companions, the funds are used identically. They receive the same modest amount specified by the Church and they both obey all the same Church-imposed rules of conduct and financial accountability.

In addition to the monetary giving described above, there is an aspect of non-monetary giving that is important to the Church and which is highlighted by this case. The Church, like most religions and other charities, depends heavily upon the time, talents and energy of service volunteers, for nearly half of the adult members serve in some volunteer capacity at the request of the Church. All of this donated service to the Church is in addition to attendance at worship services, Sunday

[13] *Doctrine and Covenants* § 119 (1838). Neither membership nor privileges, rites or positions within the Church are obtained by paying tithing. While most appointments to service (including missionary service), and participation in certain sacred rites, are conditioned upon a member's worthiness, the faithful payment of tithing is only one of many factors in determining worthiness. Furthermore, the amount of tithing paid is irrelevant in that regard; the question being only as to obedience to Church doctrine.

[14] All of the foregoing donations, which primarily benefit the Church, are readily distinguishable from payments made primarily for the benefit of the payors or their family, such as school tuition, purchase of religious books for personal study, or purchase of food or other items at fund raising events, all of which are non-deductible.

School, temple worship, scripture study and prayer which are the basic elements of personal worship within the Church.

The full-time missionaries are similar to these other members in that they donate their time with no expectation of reward or personal benefit in return. But they are different in that their call to serve takes them away from home and requires their full-time devotion to the duties of the call. This necessitates their being provided with financial support—not compensation but the necessities of survival.[15] Neither the missionaries nor any of the other volunteers within the Church claim any charitable contribution for the value of their donated time. Yet somebody has to pay for the expenses necessarily incurred by the missionaries. Just as the time of the missionary is a donation to the Church, even so, the cash payments to enable the giving of that time and service are also donations to the Church.

D. The Purpose of the Program Is to Benefit the Church

The money contributed by the parents as well as the services rendered by the missionaries redound solely to the benefit of the Church. As demonstrated above, missionary work is clearly commanded by the basic tenets of the Church. The Church receives from each missionary 85 to 90 hours per week of direct services and time spent in preparation to serve. The Church decides where each missionary will serve according to its needs. The missionaries preach, teach, provide local leadership, minister to the spiritual needs of people (members and nonmembers), and do anything else the Church requires. These are the benefits rendered to the Church by the services of the missionaries. The monetary contributions by the parents and other donors confer supplemental

[15] In 1841, Apostle Parley P. Pratt declared of missionaries: ". . . no man should be hired, and thus make preaching a trade." 2 Millennial Star, *supra*; see n. 7.

benefits on the Church by relieving the Church of the costs necessarily incident to the missionary services.

While it is true that a missionary may mature and develop self confidence while on a mission, that intangible benefit, like the personal growth received from any other genuinely charitable activity, is totally incidental to the selfless donation of time and energy in service to the Church. The missionary is called by the Church because the Church needs his or her services in its worldwide mission, and not because it wants to provide a special experience and training for the missionary. The paradox of all charitable service applies here, namely, that a missionary's personal growth derives from laboring to benefit others, not to benefit self. In the words of Christ: "For whosoever will save his life shall lose it: but whosoever will lose his life for my sake, the same shall save it."[16] Finally, any growth which does come is not purchased by the parents' donation, but springs from the missionary's donated labor and sacrifices.

Missionary service cannot be compared to schooling, for the mission does not prepare the missionary for any gainful employment, nor is it a prerequisite to any other callings in the Church. The missionary receives no educational credits for mission service. On the contrary, a mission represents an interruption in schooling.

E. Reasons the Church Prefers Direct Payment

The Church prefers payment for missionary expenses to be made directly from the parents to the missionary. The reasons are solidly grounded on important Church objectives.

1. Tradition

As with any religion, the Church draws strength from its traditions, especially those developed during its times of hardship. Not only is the missionary service donated

[16] *Luke* 9:24.

by the young missionaries a fundamental part of that religious lore, but so is the system whereby the financing of that service comes from family and friends directly in connection with the service. To finance the missionary service from general funds of the Church, donated with no connection to the performance of the services, would eliminate an element of the donor's involvement in the service itself, which is important to the vitality of the Church's sacred traditions.

2. Family Connection to Service Builds Faith

For 160 years, families have furnished the missionary force of the Church. In the beginning, wives and children sent their husbands and fathers—sending them money to keep them alive, and willingly going without at home out of sheer devotion to the Church. Today, fathers, mothers and siblings sacrifice at home, so that a brother or sister can give two full years of service to the Church. The Church has found that a family's faith, its commitment to the Church's rites, commandments and doctrines, is immeasurably strengthened through the sacrifices made in directly participating in the missionary service through financial contributions. This has always been an important factor in the strength and vitality of the Church.

3. Keeps the Missionary Frugal

The Church has proved through long experience that its missionaries can live adequately on amounts far less than employees expect as per diem allowances from an employer.[17] Although this is primarily due to the close

[17] The federal amount allowable daily for rent and food within the United States is at least $66.00 but rises to $141.00 in New York City. By contrast missionaries in the United States spend at least $7.76 per day, with the high being $13.58 in New Hampshire. The missionary amounts include not only rent and food, but also Church educational pamphlets and other incidental costs. Internationally the difference between Church requested amounts and the allowable federal per diem is even greater. See Appendix A for comparisons.

control exercised over the missionary's finances by the Church, the missionaries' awareness that their services require a financial sacrifice from their loved ones at home is also an important factor. Thus, missionaries conscientiously keep their expenses to a minimum, and avoid any non-missionary activities that would enlarge the burden upon their families. It is unlikely that the missionaries would maintain the same frugality if their finances came from the more remote and impersonal institution of the Church itself.

4. Helps Avoid Tax & Visa Problems in Foreign Countries

To obtain visas in many foreign countries, missionaries must demonstrate (1) that they will be "sponsored" by donated funds from the home country (no welfare burden on the host country), and (2) that they will not be employed in the host country (no competition for host country jobs). The Church's direct payment method of financing missionary service satisfies both of those requirements. It also avoids any controversy as to whether the missionaries' funds might be taxable income in the host country. Changing to a system in which all missionary donations would be paid to the Church and then disbursed to the missionaries would raise serious questions in some countries as to the missionaries' status for visa and/or income tax purposes. This is an unnecessary burden to impose upon the Church's purely religious program.

5. Reduces Administrative Burdens and Costs

The present Church system of having most missionary contributions paid directly to the missionaries results in very significant cost and labor savings for the Church. Changing that system would impose administrative, accounting and personnel costs at the headquarters level of the Church, as well as administrative burdens upon ecclesiastical officers at the congregational level. The ad-

ditional hours of local leader involvement, and the added headquarters costs, that would be required to double, triple or further multiply the number of times each of the thousands of missionary contributions must be handled each month would be staggering. Such a change would unnecessarily add a layer of bureaucratic expense to a vital program that is already a financial burden for the Church and its members.

6. Responds to Change in Location or Needs

Generally, each missionary is moved from one area to another every three to six months. In addition, certain mission assignments, such as those involving use of a car, require the missionary to receive supplemental financial support. Through weekly letters from the missionaries, the parents learn of these changes faster than either the local Church leaders or Church headquarters. Therefore, the direct payment method of financing missionary service is the most efficient way for parents to respond to such changes in needs. On the spartan budget of a missionary, failing to receive sufficient funds on time would be extremely disruptive of the work and morale. The present system also makes it easier to respond to changing locations and financial needs.

SUMMARY OF ARGUMENT

The proper test to determine whether payments are "to or for the use of" a recognized charity is whether the charity receives the primary benefit of the payments. Whether the charity receives possession or not is irrelevant. Neither the lower court nor the IRS disputed the indisputable fact that the intended and actual primary beneficiary of the Taxpayers' payments was the Church. The same is true of missionary contributions from thousands of the Church's faithful members.

The Church does not come into actual physical possession of most missionary contributions. The Church does, however, exercise control in many ways over the recipient missionaries, over the manner in which the

money is spent, and even over the amount and timing of the donations. The degree of control exercised by the Church is sufficient to satisfy the statutory standard of a gift "to or for the use of" the Church.

The suggestion by the IRS to the courts of appeals that the direct payment might be subject to abuses lacks any substance. There is no evidence of such abuses in the Tenth or Fifth Circuits, where deductions similar to those at issue here have been permitted. Even more important, this case deals with the practices of only one Church, whose policies and procedures—particularly those resting on the Church's objective to keep missionary expenses as low as possible—are an effective safeguard against abuse.

ARGUMENT

I. BECAUSE THE CHURCH RECEIVED THE PRIMARY BENEFIT OF THE TAXPAYERS' MISSIONARY DONATIONS, THE GIFTS WERE "TO OR FOR THE USE OF" THE CHURCH, AND ARE THEREFORE DEDUCTIBLE

This court's decision in *Duberstein* v. *Commissioner*, 363 U.S. 278 (1960), defining the term "gift" in another context, is instructive in this case. There, the government's proposed adoption of a mechanical test was rejected, in favor of applying the court's "experience with the mainsprings of human conduct to the totality of the facts of each case." *Duberstein*'s teachings have since been regularly applied to Section 170 cases.[18] Yet the lower court, at the urging of the government, proposes a mechanical test here to the effect that the contributions at issue cannot be deductible unless they are placed in the physical possession of the Church. Respectfully, the Church maintains that such a rule exalts form over substance, ignoring the totality of the

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[18] For example, see *Dejong* v. *Commissioner*, 309 F.2d 373, 379 (9th Cir. 1962) which first applied *Duberstein* to a Section 170 case.

facts here which clearly demonstrate that the Church received the primary benefit of the Taxpayers' gifts. Neither the IRS nor the two lower courts in this case denied that the Church was the true beneficiary, but all slavishly held to the mechanical test of possession.

As this court declared in *Helvering* v. *Bliss*, 293 U.S. 144 (1934), the charitable contribution deduction was added to the law "to encourage gifts to religious, educational and other charitable objects . . .," and being "begotten from motives of public policy, [is] not to be narrowly construed." The decision of the Ninth Circuit so narrowly construes the requirements of Section 170 by insisting on physical possession of the donated money by the Church, that it ignores both the primary charitable benefit present and the plain "to or for the use of" language of the statute.

The Church's understanding of the foregoing principles finds support in *White* v. *United States*, 725 F.2d 1269 (10th Cir. 1984), which held that payments essentially identical to those under consideration here were deductible. Noting that the government's proposed test of control by the charity over the expenditure of funds "has never been applied to expenses incurred by a taxpayer performing services for a bona fide organization," [19] that court held that "transportation and living expenses of a missionary serving far from home are deductible . . . because the expenditures primarily benefit the church and not the spender . . . [or] the person whose expenses are being paid." [20] *White*, 725 F.2d at 1271-2.

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[19] Citing, *Rockefeller* v. *Commissioner*, 676 F.2d 35 (2nd Cir. 1982); *Archbold* v. *United States*, 444 F.2d 1120 (Ct. Cl. 1971); *Sampson* v. *Commissioner*, 43 T.C.M. (CCH) 1408 (1982); and B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 35.12 n.14 (1981).

[20] Citing, *Dowell* v. *United States*, 553 F.2d 1233, 1238 (10th Cir. 1977); and *Smith* v. *Commissioner*, 60 T.C. 988 (1973). See also, *Winn* v. *Commissioner*, 595 F.2d 1060 (5th Cir. 1979); and *Morey* v. *Riddell*, 205 F. Supp. 918 (S.D. Ca. 1962).

The above cases, and those cited in n. 19, *supra*, all involved payments to permit a named person to render services to a charity. They are all readily distinguishable on the basis of primary charitable benefit from cases involving payments to obtain benefits for the donor or a named person. See *Hernandez* v. *Commissioner*, 109 S. Ct. 2136 (1989); *Tripp* v. *Commissioner*, 337 F.2d 432 (7th Cir. 1964); and *Thomason* v. *Commissioner*, 2 T.C. 441 (1943).

The Church's position, urging a focus on whether the primary benefit is to the Church, is also in harmony with *Rockefeller* v. *Commissioner*, 676 F.2d 35 (2nd Cir. 1982), *aff'g*, 76 T.C. 178 (1981), which considered the deductibility limits of certain payments to individuals for expenses incident to their giving services to various charities. Except for the kinds of charities served (there is no indication that *Rockefeller* involved missionary services to a church), that case is essentially identical to this case. The Second Circuit and the Tax Court both ruled that the contributions paid directly to individuals in that case were contributions to the various charities. For example, the Tax Court found:

> Unreimbursed expenses made incident to the rendition of services to charitable organizations have long been recognized as charitable contributions . . . . As we understand the facts, the payments were made for services that were rendered directly to charities which were the immediate beneficiaries of services. Had the petitioners made the payments directly to the charities and the charities had paid for the services, there would seem to be little question that the payments would qualify for the unlimited deduction. We see no reason why this arrangement should be treated differently. (*Rockefeller* v. *Commissioner*, 76 T.C. 178 (1981).)

Neither court in *Rockefeller* regarded the lack of physical possession of the money by the charities as being controlling or even significant. Instead, where the pay-

ments were to obtain services for the charities, the method of payment was regarded as an issue of form and not of substance. Again, this is an appropriate application of the *Duberstein* injunction to search out the true nature of a transaction and to avoid reliance upon a talisman.

II. THE CHURCH EXERCISED SUFFICIENT CONTROL OVER THE DONATED FUNDS, TO QUALIFY THE CONTRIBUTIONS FOR DEDUCTIBILITY EVEN WITHOUT HAVING PHYSICAL POSSESSION

Although the Fifth Circuit in *Brinley v. Commissioner*, 782 F.2d 1326 (5th Cir. 1986), *rev'g*, 82 T.C. 932 (1984) (a case with identical facts), accepted the primary benefit test as articulated by the Tenth Circuit in *White*,[21] it offered an independent, alternative test based on the charity's control of the donated funds, without requiring physical possession by the charity:

> The Brinleys have repeatedly cautioned this Court against exalting "form over substance" in arguing that *Winn*, *supra*, should not be construed to require actual or physical control over the donated funds. We agree.
>
> . . .
>
> [W]e conclude that control would be established in the present case, and that the Brinleys would be entitled to a charitable deduction, if the Brinleys

[21] [W]e conclude that *White* is correct in holding that it was not necessary for the LDS Church to have control over the funds given directly to its missionaries in order to support charitable contribution deductions under § 170. As the Brinleys correctly note, the standard in this Circuit for determining the deductibility of expenditures incurred in the service of charity is one of causation: "The charitable work must be the cause of the payment in order for the payment to be deductible." *Orr* v. *United States*, 343 F.2d 553, 557 (5th Cir. 1965). *Brinley*, 782 F.2d at 1330-31.

> can show that the Church requested them to make specific payments and that they responded to these specific requests. . . . In this manner, the Church retains control and discretion as to the use of the donated funds.

Brinley, 782 F.2d at 1335.[22] The Church has demonstrated that its control over the financial arrangements of its missionaries has all of the elements required in *Brinley*, and more. Therefore, the contributions at issue here should be deductible by reason of the alternative non-possessory control test announced by the Fifth Circuit.

III. WHERE NO ABUSE BY PARTIES TO THE GIFTS AT ISSUE HAS BEEN PROVED OR ALLEGED, SPECULATIVE FEAR OF ABUSES BY OTHERS IS NOT A VALID BASIS ON WHICH TO DENY THE DEDUCTIBILITY OF THESE CONTRIBUTIONS

The Church shares the IRS' concern that the administration of the revenue laws be fair, efficient, and even-handed. The deductibility of contributions to the Church's missionaries poses no threat to that shared objective.

A. No Abuse Has Been Alleged in the 5 Years Since *White*

It has been more than five years since the Tenth Circuit published its decision in *White*. Yet, the Church

[22] See also, *Sampson* v. *Commissioner*, T.C. Memo 1982-276, in which the Tax Court stated:

> Respondent makes much of the fact that had petitioner donated the funds directly to the Attorney General's or the sheriff's offices, they would have been appropriated by the legislature. . . . [H]owever, there is no requirement that the exempt organization control the performance of the charitable services or the related expenditures. Further, the hypothetical possibility that the legislature may have diverted the funds elsewhere does not make them and the underlying services any less related to and in furtherance of the State and County's basic function of law enforcement.

is unaware of any instances of abuse involving contributors to its missionary program, or involving other taxpayers trying to devise a scheme based on the ruling in *White*. The reason is that the tax avoidance and private gains would be too small in relation to the costs for anyone to fashion an abusive scheme for personal benefit where (1) a *bona fide* church requests specific minimal amounts to be sent to specific full-time missionaries chosen by the church, (2) as part of a program which requires services from the missionaries far in excess of the value of the money sent, and (3) for its own purposes and in its own interest, the church closely supervises both the missionary and the missionary's use of the donated funds. Because the Church's missionary program is carefully controlled and demands sacrifice from the missionaries, it is unsuitable for abuse.

B. Approval of the Deduction at Bar Could Be Done Within a Framework Meeting IRS Needs

In its brief supporting the grant of certiorari the government argued that donations must be paid directly to charities so that:

> . . . the IRS can seek to confirm whether such contributions are actually being used for charitable purposes by examining the activities of a limited number of pre-qualified charitable recipients. Government's Brief at 8.

This implies that the *only* alternative to charity possession of all contributions is a world in which charities would have *no* control and which would require the IRS to audit massive numbers of taxpayers. The government's assertion ignores the large range of alternatives, including those suggested by this case, which lie between the extremes.

This case does not require a holding allowing deductibility for all expenditures in any way related to services which might benefit a charity. The taxpayers seek only a narrow holding that payments made (1) at the request of the Church, (2) in the modest amounts specified by the Church, (3) to a missionary designated in advance by the Church, and (4) as part of a program where the Church controls both the missionary and his/her use of the donations, are deductible, notwithstanding that the Church did not have actual possession of the money.

Under such a holding, the IRS could effectively monitor the deduction by reviewing the charity's activities at the program level. This is no different than the IRS has already done for non-church programs in approving deductions for gifts given directly to individuals selected by a charity (1) in disaster relief programs described in Rev. Rul. 66-10, 1966-1 C.B. 47; (2) in an unwed mother program in Rev. Rul. 69-473, 1969-2 C.B. 37; or (3) in the Big Brothers/Big Sisters program in Rev. Rul. 70-519, 1970-2 C.B. 62.

Furthermore, auditing contributions to the Church's program is not as difficult as suggested by the IRS. The Church's official "call" letter and related correspondence, sent to every missionary, specifies the mission to which he/she has been called, the period of requested service (including the date the mission is to commence), and the amount of monthly donations required for the particular mission. The Church also publishes a quarterly update of the amounts requested for each mission. In its own interest, the Church keeps these amounts low, as can be seen from Appendix A. Who but a Mormon Missionary could live today for $400 per month in New York City or $360 per month in Washington, D.C.? With these documents an auditor could easily verify that the recipient of the missionary donations was in fact a Church missionary and that the donations were in line with the amounts requested by the Church. In summary, the IRS' best ally in ensuring efficient administration of the tax

law, as it applies to missionary contributions, is the Church itself, because of the shared objectives to keep missionary expenses as low as possible and to assure that all contributions are used exclusively for Church purposes. The Church's present system of financing its missionary services is the most effective way to meet both of these objectives.

C. The Church Exercises the Same Substantial Control Whether Donations Are Given Directly to the Missionary or Directly to the Church

A careful appraisal of the Church's program shows an extraordinary level of control over of the missionaries' actual expenditures as well as their activities. The Church selects the missionary, determines the amount he/she needs and requests donors to make the necessary donations. The missionary receives frequent instructions from the Church on the proper use of the donated funds and agrees to follow those instructions. Each missionary always has a companion who reinforces the resolve to obey Church instructions. The missionary makes a weekly and a monthly report of all expenditures to the mission president. If the amount spent exceeds the amount expected the missionary is required to explain the difference in detail.

Moreover, in some circumstances the Church, through its mission presidents, actually takes control of some of the missionaries' funds. This practice occurs when there is a need to equalize certain kinds of expenses as between missionaries in a given mission, such as rent and other living costs which vary widely between rural and urban areas within a mission.[23] It may also be invoked to equalize travel costs among missionaries. This is an important way in which the Church exercises control of the money in pursuit of the Church's needs. The Church's

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[23] Deposition of Benjamin Davis, at 13 (Nov. 6, 1986).

success in restraining costs is additional proof of the effectiveness of the Church's control of the missionary contributions.

The control just described is the same whether a missionary receives the funds directly from a donor, in response to the Church's request, or from the Church's pool of undesignated contributions. The Church's real control is not increased by physical receipt of the donation. After 160 years' experience in operating its missionary program the Church has proven its present system to be efficient and beneficial to advancement of its work.

CONCLUSION

Allowing deduction of the contributions in the instant case is proper under the rationale of *Duberstein*, consistent with the language of the statute and carries out the intent of Congress to encourage works of charity and religion. Therefore, the opinion of the Ninth Circuit should be reversed with a narrow ruling applicable only to *bona fide* missionary programs such as the Church's.

Respectfully submitted,

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APPENDICES

APPENDIX A

COMPARISON OF TYPICAL U.S. MISSIONARY ALLOWANCES TO FEDERAL PER DIEMS (PER FEDERAL TRAVEL REGULATIONS OCTOBER 9, 1989—CHURCH OCTOBER 31, 1989, LIST)

	DAILY		MONTHLY		PERCENT COMPARISON	
	Mission Allowance	Federal Per Diem	Mission Allowance	Federal Per Diem	City [1]	State [2]
Phoenix, AZ	$11.18	$ 78.00	$340.00	$2,372.50	698%	617%
Los Angeles, CA	9.04	114.00	275.00	3,467.50	1261%	785%
Oakland, CA	12.82	98.00	390.00	2,980.83	764%	559%
Denver, CO	12.33	99.00	375.00	3,011.25	803%	560%
Tampa, FL	13.48	78.00	410.00	2,372.50	579%	497%
Atlanta, GA	11.05	106.00	336.00	3,224.17	960%	607%
Honolulu, HI	11.84	126.00	360.00	3,832.50	1065%	642%
Boise, ID	9.86	72.00	300.00	2,190.00	730%	700%
Chicago, IL	12.59	117.00	383.00	3,558.75	929%	532%
Peoria, IL	11.54	81.30	351.00	2,463.75	702%	581%
Des Moines, IA	10.68	76.00	325.00	2,311.67	711%	627%
Lansing, MI	12.10	74.00	368.00	2,250.83	612%	562%
St. Louis, MO	11.93	85.00	363.00	2,585.42	712%	578%
Manchester, NH	13.58	85.00	413.00	2,585.42	626%	567%
Morristown, NJ	12.99	88.00	395.00	2,676.67	678%	547%
New York, NY	13.15	141.00	400.00	4,288.75	1072%	509%

	DAILY		MONTHLY		PERCENT COMPARISON	
	Mission Allowance	Federal Per Diem	Mission Allowance	Federal Per Diem	City [1]	State [2]
Rochester, NY	10.52	89.00	320.00	2,707.08	846%	637%
Cleveland, OH	12.82	93.00	390.00	2,828.75	725%	523%
Tulsa, OK	10.62	71.00	323.00	2,159.58	669%	622%
Harrisburg, PA	9.96	88.00	303.00	2,676.67	883%	663%
Nashville, TN	13.15	78.00	400.00	2,372.50	593%	502%
San Antonio, TX	10.75	76.00	327.00	2,311.67	707%	614%
Ogden, UT	9.17	86.00	279.00	2,615.83	938%	710%
Salt Lake City, UT	7.76	86.00	236.00	2,615.83	1108%	851%
Roanoke, VA	11.24	75.00	342.00	2,281.25	667%	631%
Spokane, WA	10.85	73.00	330.00	2,220.42	673%	608%

[1] Percentage is Federal per diem for the city divided by the mission expense. (High = 1261%; Low = 579%; Median = 711%)

[2] Percentage is lowest Federal per diem for the state divided by the mission expense (High = 851%; Low = 497%; Median = 597%)

COMPARISON OF TYPICAL INTERNATIONAL MISSIONARY ALLOWANCES TO FEDERAL PER DIEMS (PER FEDERAL TRAVEL REGULATIONS OCTOBER 9, 1989—CHURCH OCTOBER 31, 1989, LIST)

	DAILY		MONTHLY		PERCENT COMPARISON	
	Mission Allowance	Federal Per Diem	Mission Allowance	Federal Per Diem	City [3]	Country [4]
Buenos Aires, Argentina N.	6.58	106.00	200.00	3,224.17	1612%	563%
Cordoba, Argentina	4.60	37.00	140.00	1,125.42	804%	804%
Melbourne, Australia	11.38	123.00	346.00	3,741.25	1081%	949%
Brussels, Belguim	15.62	140.00	475.00	4,258.33	896%	531%
Belize	4.93	96.00	150.00	2,920.00	1947%	1947%
Cochabamba, Bolivia	4.93	76.00	150.00	2,311.67	1541%	933%
Fortaleza, Brazil	3.95	76.00	120.00	2,311.67	1926%	1571%
Calgary, Canada	11.74	114.00	357.00	3,467.50	971%	588%
Halifax, Canada	12.39	119.00	377.00	3,619.58	960%	557%
Montreal, Canada	12.00	127.00	365.00	3,862.92	1058%	575%
Osorno, Chile	4.93	69.00	150.00	2,098.75	1399%	1399%
London, England S.	18.67	172.00	568.00	5,231.67	921%	514%
Manchester, England	12.46	103.00	379.00	3,132.92	827%	770%
Bordeaux, France	13.25	110.00	403.00	3,345.83	830%	830%
Frankfurt, Germany	15.35	137.00	467.00	4,167.08	892%	449%
Quetzaltenango, Guatemala	3.62	49.00	110.00	1,490.42	1355%	1355%
Hong Kong	9.83	160.00	299.00	4,866.67	1628%	1628%
Iceland	11.41	125.00	347.00	3,802.08	1096%	1096%
Dubland, Ireland	12.82	149.00	390.00	3,771.67	1162%	967%
Fukuoka, Japan	13.71	205.00	417.00	6,235.42	1495%	759%
Nagoya, Japan	13.15	179.00	400.00	5,444.58	1361%	791%

	DAILY		MONTHLY		PERCENT COMPARISON	
	Allowance Mission	Federal Per Diem	Mission Allowance	Federal Per Diem	City [5]	Country [6]
Pusan, Korea	11.18	140.00	340.00	4,258.33	1252%	716%
Taejom, Korea	10.68	140.00*	325.00	2,433.33	1310%	749%
Chihuahua, Mexico	4.11	82.00	125.00	2,494.17	1995%	1314%
Mexico City, Mexico S.	3.52	102.00	107.00	3,102.50	2900%	1535%
Tuxtla-Gutierrez, Mexico	4.04	54.00	123.00	1,642.50	1335%	1335%
Lima, Peru	1.87	98.00	57.00	2,980.83	5230%	2348%
Trujello, Peru	1.18	44.00	36.00	1,338.33	3718%	3718%
Davao City, Philippines	5.31	42.00	192.00	1,277.50	1283%	665%
Quezon City, Philippines W.	7.40	42.00	225.00	1,277.50	568%	568%
Mascarene Is., Reunion	12.66	131.00	385.00	3,984.58	1035%	1035%
Geneva, Switzerland	15.81	158.00	481.00	4,805.83	999%	790%
Bangkok, Thailand	9.01	117.00	274.00	3,558.75	1299%	377%
Tonga	2.63	76.00	80.00	2,311.67	2890%	2890%
Caracas, Venezuela	4.93	114.00	150.00	3,467.50	2312%	1724%
Apia, Western Samoa	3.19	110.00	97.00	3,345.83	3449%	3449%

[5] Percentage is Federal per diem (without government facilities) for the city where mission headquarters is located divided by the mission amount. (High = 5230%; Low = 568%; Median = 1325%)

[6] Percentage is lowest Federal per diem (without government facilities) for the country where mission headquarters is located divided by the mission amount. (High = 3718%; Low = 377%; Median = 875%)

31 October 1989

AVERAGE MONTHLY COST PER SINGLE MISSIONARY FOR MONTHS JULY, AUGUST, SEPTEMBER, 1989

Mission	Average	Mission	Average
Alabama Birmingham	$355.00	Belize	$150.00
Alaska Anchorage	462.00	Boliva Cochabamba	150.00
Argentina Bahia Blanca	197.00	Bolivia La Paz	136.00
Argentina Buenos Aires North	200.00	Brazil Belo Horizonte	120.00
Argentina Buenos Aires South	145.00	Brazil Brasilia	158.00
Argentina Cordoba	140.00	Brazil Campinas	103.00
Argentina Rosario	182.00	Brazil Curitiba	106.00
Argentina Salta	172.00	Brazil Fortaleza	120.00
Arizona Phoenix	340.00	Brazil Porto Alegre	120.00
Arizona Tempe	325.00	Brazil Recife	103.00
Arkansas Little Rock	361.00	Brazil Rio de Janeiro	133.00
Australia Adelaide	372.00	Brazil Sao Paulo North	123.00
Australia Brisbane	340.00	Brazil Sao Paulo South	132.00
Australia Melbourne	346.00	California Anaheim	275.00
Australia Perth	321.00	California Arcadia	310.00
Australia Sydney	346.00	California Fresno	374.00
Austria Vienna	388.00	California Los Angeles	275.00
Austria Vienna East	290.00	California Oakland	390.00
Belgium Brussels	475.00	California Sacramento	300.00

AVERAGE MONTHLY COST PER SINGLE MISSIONARY FOR MONTHS JULY, AUGUST, SEPTEMBER, 1989

Mission	Average
California San Bernardino	$333.00
California San Diego	279.00
California San Jose	341.00
California Santa Rosa	351.00
California Ventura	347.00
Canada Calgary	357.00
Canada Halifax	377.00
Canada Montreal	365.00
Canada Toronto	360.00
Canada Vancouver	368.00
Canada Winnipeg	360.00
Chile Antofagasta	150.00
Chile Concepcion	135.00
Chile Osorno	150.00
Chile Santiago North	140.00
Chile Santiago South	140.00
Chile Vina Del Mar	175.00
Colombia Barranquilla	131.00
Colombia Bogota	140.00
Colombia Cali	108.00
Colorado Denver	$375.00
Connecticut Hartford	387.00
Costa Rica San Jose	185.00
Denmark Copenhagen	334.00
Denmark Copenhagen Iceland	347.00
Dominican Republic Santiago	207.00
Dominican Republic Santo Dom.	215.00
Ecuador Guayaquil	160.00
Ecuador Quito	96.00
Salvador San Salvador	67.00
England Bristol	462.00
England Coventry	435.00
England Leeds	330.00
England London	520.00
England London South	568.00
England Manchester	379.00
Fiji Suva	245.00
Fiji—Kiribati	143.00
Fiji—New Caledonia	293.00
Fiji—Vanuatu	260.00
Finland Helsinki	400.00

Mission	Average
Florida Ft. Lauderdale	$399.00
Florida Jacksonville	370.00
Florida Tallahassee	353.00
Florida Tampa	410.00
France Bordeaux	403.00
France Paris	404.00
Georgia Atlanta	336.00
Germany DR Dresden	238.00
Germany Frankfurt	467.00
Germany Hamburg	395.00
Germany Munich	398.00
Ghana Accra	103.00
Guatemala Guatemala City No.	155.00
Guatemala Guatemala City So.	180.00
Guatemala Quetzaltenango	110.00
Haiti Port-au-prince	292.00
Hawaii Honolulu	360.00
Honduras Tegucigalpa	143.00
Hong Kong	299.00
Idaho Boise	300.00
Illinois Chicago	383.00
Illinois Peoria	351.00
India	77.00
Indiana Indianapolis	340.00
Iowa Des Moines	$325.00
Ireland Dublin	390.00
Italy Catania	353.00
Italy Milan	354.00
Italy Rome	390.00
Jamaica Kingston	322.00
Japan Fukuoka	417.00
Japan Kobe	400.00
Japan Nagoya	400.00
Japan Okayama	420.00
Japan Osaka	400.00
Japan Sapporo	411.00
Japan Sendai	342.00
Japan Tokyo North	423.00
Japan Tokyo South	414.00
Kentucky Louisville	310.00
Korea Pusan	340.00
Korea Seoul	345.00
Korea Seoul West	343.00
Korea Taejon	325.00
Liberia Monrovia	146.00
Louisiana Baton Rouge	323.00
Luxembourg	500.00
Malaysia	151.00

AVERAGE MONTHLY COST PER SINGLE MISSIONARY
FOR MONTHS JULY, AUGUST, SEPTEMBER, 1989

Mission	Average
Malta	$350.00
Mascarene Islands	385.00
Massachusetts Boston	413.00
Mauritius	297.00
Mexico Chihuahua	125.00
Mexico Guadalajara	110.00
Mexico Hermosillo	100.00
Mexico Mazatlan	120.00
Mexico Merida	119.00
Mexico Mexico City East	93.00
Mexico Mexico City North	103.00
Mexico Mexico City South	107.00
Mexico Monterrey	139.00
Mexico Puebla	105.00
Mexico Queretaro	115.00
Mexico Tampico	105.00
Mexico Torreon	95.00
Mexico Tuxtla-Gutierrez	123.00
Mexico Veracruz	95.00
Michigan Dearborn	353.00
Michigan Lansing	$368.00
Micronesia Guam	330.00
Minnesota Minneapolis	375.00
Mississippi Jackson	300.00
Missouri Independence	380.00
Missouri St. Louis	363.00
Montana Billings	325.00
Netherlands Amsterdam	400.00
Nevada Las Vegas	313.00
New Hampshire Manchester	413.00
New Jersey Morristown	395.00
New Mexico Albuquerque	332.00
New York New York	400.00
New York Rochester	320.00
New Zealand Auckland	350.00
New Zealand Christchurch	298.00
Nicaragua	180.00
Nigeria Aba	105.00
Nigeria Lagos	110.00
North Carolina Charlotte	347.00

Mission	Average
North Carolina Raleigh	$372.00
Norway Oslo	416.00
Ohio Cleveland	390.00
Ohio Columbus	351.00
Oklahoma Tulsa	323.00
Oregon Portland	315.00
Panama Panama City	205.00
Paraguay Asuncion	160.00
Pennsylvania Harrisburg	303.00
Pennsylvania Philadelphia	315.00
Pennsylvania Pittsburgh	316.00
Peru Arequipa	95.00
Peru Lima East	57.00
Peru Lima North	80.00
Peru Lima South	75.00
Peru Trujillo	36.00
Philippines Bacolod	171.00
Philippines Baguio	200.00
Philippines Cagayan de Oro	178.00
Philippines Cabu	187.00
Philippines Davao	192.00
Philippines Manila	225.00
Philippines Naga	192.00
Philippines Quezon City	215.00
Philippines Quezon City West	225.00
Portugal Lisbon	$286.00
Portugal Porto	265.00
Puerto Rico San Juan	339.00
Reunion	304.00
Samoa Apia	97.00
Scotland Edinburgh	406.00
Singapore	159.00
South Africa Cape Town	300.00
South Africa Johannesburg	275.00
South Carolina Columbia	350.00
South Dakota Rapid City	350.00
Spain Barcelona	330.00
Spain Bilbao	322.00
Spain Las Palmas	409.00
Spain Madrid	350.00
Spain Seville	325.00
Sweden Stockholm	347.00
Switzerland Geneva	481.00
Switzerland Zurich	475.00
Tahiti Pepeete	320.00
Taiwan Taichung	295.00
Taiwan Taipei	298.00
Tennessee Nashville	400.00
Texas Corpus Christi	325.00
Texas Dallas	359.00

AVERAGE MONTHLY COST PER SINGLE MISSIONARY
FOR MONTHS JULY, AUGUST, SEPTEMBER, 1989

Mission	Average
Texas Ft. Worth	$347.00
Texas Houston	350.00
Texas San Antonio	327.00
Thailand Bangkok	274.00
Tonga Nuku'alofa	80.00
Uruguay Montevideo	157.00
Utah Ogden	279.00
Utah Provo	276.00
Utah Salt Lake City	236.00
Venezuela Caracas	150.00

Mission	Average
Venezuela Maracaibo	$137.00
Virginia Roanoke	342.00
Washington, D.C. North	310.00
Washington, D.C. South	360.00
Washington Seattle	327.00
Washington Spokane	330.00
West Indies	347.00
West Virginia Charleston	335.00
Wisconsin Milwaukee	347.00
Zimbabwe Harare	260.00

Missionary Training Center—Provo

	Room and Board	Books and Other Essentials
English-speaking (21 days):	$168.00	$ 40.00 to $ 70.00
Non-English-speaking (8 weeks):	496.00	100.00 to 130.00

APPENDIX B

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS
Office of the First Presidency
SALT LAKE CITY, UTAH 84444

October 13, 1978

TO ALL STAKE, MISSION, AND DISTRICT PRESIDENTS, BISHOPS AND BRANCH PRESIDENTS IN THE UNITED STATES

Dear Brethren:

As we have witnessed the expansion of missionary work throughout the world, we have been moved by the faith and sacrifice of parents and others who have supported the missionary program through financial contributions. We know that the Lord has richly blessed those who have made such sacrifices, yet we are keenly aware of the increasing costs of missionary work and are anxious that these contributions not become an overwhelming burden to those members who are involved.

When a prospective missionary is recommended for a mission call, we ask that you interview both him and his parents (or whoever will be providing financial contributions toward his missionary service) and counsel with them regarding the nature and use of missionary support money. The parents or donors should be encouraged to provide only the amount needed to support the missionary program in the mission to which the prospective missionary will be assigned. This amount will be indicated by the Church at the time the missionary receives his call letter, and it may be adjusted occasionally by the mission president as circumstances require.

Both the parents and the prospective missionary should understand that missionary support funds are considered contributions to The Church of Jesus of Latter-day

Saints and that the missionary functions as an agent of the Church in receiving such money for use in the missionary program. The missionary is thus entrusted with a sacred stewardship, and he should therefore be counseled to make wise use of these Church funds in performing the labors of his calling. He should be frugal in his expenditures in order to minimize the financial burden on those who are contributing toward the missionary program. Neither should he accumulate an unnecessary surplus of these Church funds; when he is able to reduce his financial needs through careful stewardship, he should so inform the donors. About sixty days before the end of his term of service, if the missionary sees that the contributions he is receiving on behalf of the Church will exceed the financial needs of his mission, he should notify the donors of the amount of money required to enable him to complete his mission assignment so that the donations can be appropriately reduced. Before leaving the mission, the missionary will forward any surplus donations to the mission president so that all missionary contributions are used for the purpose for which they were given to the Church.

Sincerely your brethren,

/s/ Spencer W. Kimball

/s/ N. Eldon Tanner

/s/ Marion G. Romney

The First Presidency